IN THE

Supreme Court of the United States

October Term, 1939

No. 270

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF THE WILL OF GEORGE A. BOLLES, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I

SUMMARY STATEMENT OF MATTER INVOLVED

It is the contention of petitioner in this case that the Supreme Court of Ohio has denied petitioner due process of law by depriving her of the benefit of, and *of any*

opportunity to be heard with respect to her rights under an express trust and a constructive trust, which had been held by the Court of Common Pleas (R. 55 to 63) and the Court of Appeals (R. 340 to 346) to exist in her favor with respect to property having an appraised value of approximately $213,000.00 (R. 75).

Stated very briefly, this results from the court's holding that a prior Probate Court proceeding is *res judicata* of issues not raised in the Probate Court and of *which the Probate Court under the law as it stood prior to the present decision had no jurisdiction.*

This is a suit in equity in which the Supreme Court of Ohio (without passing upon the merits) reversed the above mentioned decisions of the lower Ohio courts in petitioner's favor (which were on purely *equitable* issues), and entered final judgment against petitioner solely on the respondent-executor's claim of *res judicata* based on an earlier proceeding on exceptions filed by petitioner in the Probate Court to the respondent-executor's inventory, which exceptions (and amended exceptions filed in the Court of Common Pleas) *presented only questions of legal title.* Petitioner did not even attempt to raise, on the exceptions in the former proceeding, any question of equitable right or title based upon the trust issues now relied upon by her, because prior to the decision of the Supreme Court herein, it was the settled law of Ohio that the Probate Court (and the Court of Common Pleas on appeal) had no jurisdiction to hear and determine such equitable issues on exceptions to an executor's inventory.

In her original and amended exceptions to the inventory in the former proceeding, petitioner asserted that

she had become the owner of the full legal title to the property prior to her husband's death by reason of a gift *inter vivos*, and that the executor had *no* right to or interest in the property. She lost on this claim on the executor's appeal to the Supreme Court, which held that the question before it was only whether a valid gift *inter vivos* of the legal title had been made and that the exceptions must be overruled because the evidence as to delivery of the property to her during her husband's lifetime was insufficient to sustain the claim that *legal* title had thereby passed to her. See *Bolles vs. Toledo Trust Company*, 132 O. S. 21, 4 N. E. (2d) 917.

Thereafter, petitioner filed the present suit in equity in the Court of Common Pleas, which is a court of general equity jurisdiction, and herein asserted in accordance with the decision of the Supreme Court in the former case, that legal title to the property had passed to the executor, but further alleged that it so passed subject to an express trust in favor of plaintiff established by her husband in his lifetime, and, in the alternative, that if there were no express trust actually established, that her husband had attempted to establish one and died in the belief that he had done so and that under all of the circumstances a constructive trust should be impressed upon the property in order to avoid the unjust enrichment of the executor as such and as trustee for petitioner's minor daughter, substantially the sole beneficiary under her husband's will.* See *Crooks vs. Crooks*,

* The will provided only a life income for petitioner of $500.00 per month and the will and trust instruments under which the executor is trustee set up trusts covering property not here in issue of a value of over $500,000 for the daughter. The lower courts held the evidence shows without dispute that Mr. Bolles never intended the properties here involved to go under his will.

34 O. S. 610 (1878), holding a constructive trust arises under such circumstances, cited with approval in *Streeper vs. Myers*, 132 O. S. 322 (1937). The respondent-executor denied petitioner's claims and also pleaded the decision in the former case as *res judicata.*

The Court of Common Pleas and the Court of Appeals (where under Ohio practice, this case, being a chancery case, was tried *de novo*), both held in favor of petitioner on all issues, that is, that in their judgment the express trust was established and that in the alternative a constructive trust should be impressed upon the property, and that the finding in the former proceeding was not *res judicata.*

The Supreme Court of Ohio (Judge Hart dissenting) reversed and entered final judgment herein against petitioner. The syllabus of the case, which in Ohio states the law of the case, reads as follows:

> "A final adjudication, that certain inventoried personal property is assets of a decedent's estate and lawfully included in the inventory thereof in a proceeding instituted in Probate Court by filing exceptions to the inventory, is *res judicata* when properly pleaded as a defense in a subsequent action brought by the person, who in the former proceeding was exceptor, to engraft a trust for his use and benefit upon the same personal property." (136 O. S. 517.)

The court in its *opinion* wholly ignores petitioner's alternative claim and decree of the Court of Appeals of constructive trust, but its *judgment* (based solely on *res judicata*) orders the dismissal of petitioner's suit, thus finally disposing of petitioner's claim of constructive trust, as well as her claim of express trust. Neither

opinion nor judgment deals with the merits of petitioner's claim of express or constructive trust.

As the constitutional question here presented first arose upon the filing of the Supreme Court's opinion, petitioner first raised it by application for rehearing in that court. Rehearing was denied without further opinion.

II

STATEMENT DISCLOSING BASIS OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

The judgment herein sought to be reviewed is a final judgment of the highest court of the State of Ohio dismissing both causes of action in petitioner's petition. Petitioner claims here, and by her application for rehearing in the Supreme Court of Ohio, there claimed, a right under the Fourteenth Amendment to the Constitution of the United States to an opportunity for hearing of her equitable claims herein asserted. Such claim was denied by the Supreme Court of Ohio by its action in denying petitioner's application for rehearing and adhering to its judgment dismissing both her causes of action without consideration of the merits.

The jurisdiction of this court is sustained by Section 344(b), Title 28, United States Code (Judicial Code Section 237, as amended).

The judgment of the Supreme Court of Ohio was entered April 24, 1940, application for rehearing was filed therein within rule on May 8, 1940, and denied on May 29, 1940.

It is petitioner's contention that the decision below has retroactively enlarged the jurisdiction of the Probate Court of Ohio and thereby retroactively imposed on petitioner a duty to have proceeded in Probate Court in a way contrary to the law as it existed under then controlling Ohio decisions, when there was still an opportunity for her to have so proceeded therein, and in other respects retroactively changed the law as hereinafter set forth in a manner which has deprived petitioner of her constitutional right to an opportunity for hearing on the merits of her claim.

(a) She could *not* have had such hearing in the Probate Court in the former proceeding because under the decisions of the Supreme Court of Ohio then in effect the Probate Court then had no jurisdiction thereof, and

(b) She is *denied* such hearing herein on the ground that she should have submitted her equitable rights to the (then jurisdictionless) Probate Court in the former proceeding, and

(c) Not only the jurisdiction of the Probate Court, but also the rules as to what constitutes *res judicata* were retroactively changed (as to the petitioner) by the present decision in a manner which imposes on her a duty to have asserted her equitable rights in the Probate Court although no such duty existed under the law of Ohio when her exceptions were filed and heard, and bars her from any consideration of the merits of her claims because she did not do so.

It is believed that the jurisdiction of this court is sustained by *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673, and *Herndon vs. Georgia*, 295 U. S. 441.

III

THE QUESTIONS PRESENTED

1. Is a decision of a state court of last resort which denies a party any hearing and any opportunity for a hearing on the merits of his cause of action a violation of his rights under the Fourteenth Amendment?

2. Has the Supreme Court of Ohio by its decision herein denied the petitioner any opportunity for a hearing on the merits of her equitable claims?

3. Did the Probate Court at the time petitioner's former proceeding was pending therein have jurisdiction in that proceeding to hear and determine the merits of either of her equitable claims?

   (a) Was the Probate Court a court having the necessary equitable jurisdiction to hear and determine such claims?

   (b) Did the Probate Court on exceptions to the inventory have jurisdiction to hear and determine such equitable questions?

4. At the time petitioner's former proceedings were pending in Probate Court was it her duty under the law of Ohio to attempt to support her exceptions by the assertion of her equitable rights and title, as well as by assertion of her legal rights?

5. Has the Supreme Court of Ohio, by its decision herein, retroactively imposed upon petitioner a duty to have asserted her equitable rights in support of her exceptions in Probate Court and barred her from relief because she did not perform that then non-existent duty?

6. Was the raising of the Federal question on application for rehearing in the Supreme Court timely?

IV

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Ohio has decided a Federal question of substance (hereinbefore stated) in a way probably not in accord with applicable decisions of this court.

> Rule 38, U. S. Supreme Court;
> *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673;
> *Herndon vs. Georgia*, 295 U. S. 441.

The Federal question was properly raised in the state Supreme Court on motion for rehearing (which was denied without opinion or mention of the Federal question) as the question did not arise until the decision of that court.

> *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673;
> *Herndon vs. Georgia*, 295 U. S. 441 (opinion of court and dissenting opinion).

The Supreme Court of Ohio erred, and denied petitioner due process of law, in holding that petitioner is barred from enforcing her equitable rights in this proceeding because she did not attempt in the former proceeding to enforce them in a way (*i.e.*, by exceptions to the inventory) in which they were unenforceable under the decisions of that court in effect at the time that way

was still open to petitioner, thereby forever depriving petitioner of her equitable rights without hearing.

Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer, 281 U. S. 673, *supra.*

Herndon vs. Georgia, 295 U. S. 441.

The Supreme Court of Ohio further erred and denied petitioner due process of law, in that its decision retroactively changed the law of Ohio so as to treat a claim of legal title, and a claim of equitable title or right, merely as separate grounds supporting one cause of action, instead of treating them as had always theretofore been the law of Ohio, as separate claims or causes of action, and thereby retroactively imposed upon petitioner the duty to plead her equitable rights in addition to her legal rights on exceptions to the inventory and deprived her of her equitable rights without hearing because she failed to anticipate that the law would thus be changed and thus further denied her due process of law.

The Supreme Court of Ohio further erred and denied petitioner due process of law, in that its decision retroactively denied to petitioner the right which was hers under the decisions of that court in effect at the time her exceptions were filed and heard, first, to assert her supposed legal rights by the remedy of exceptions to the inventory, and failing in that (by reason of the nonexistence of the supposed legal right) then to assert her equitable rights by the remedy of a suit in equity, and thereby deprived petitioner of her equitable rights, without hearing, because she failed to anticipate that the law would thus be changed.

V

PRAYER

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Ohio, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a transcript of the record and proceedings therein, and that the judgment and decree of the Supreme Court of Ohio be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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I. OPINIONS BELOW

The opinion of the Court of Appeals (filed May 1, 1939) is at pages 481-490 of the record.

The opinion of the Supreme Court of Ohio (filed April 24, 1940, is at pages 490-495 of the record and is reported in 136 O. S. 517.

II. JURISDICTION

The jurisdiction of this court is based upon Section 344(b), U. S. C., Title 28 (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1913, c. 448, Section 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 937; Jan. 31, 1928, c. 14, Section 1, 45 Stat. 54).

The decisions of this court relied upon by petitioner as supporting her claim that a question under the Fourteenth Amendment is involved herein, are

Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer, 281 U. S. 673;
Herndon vs. Georgia, 295 U. S. 441.

Petition for rehearing was filed on May 8, 1940, within 14 days of the decision of the Supreme Court of Ohio (April 24, 1940), as required by Rule 20 of that court, and was denied May 29, 1940 (R. 476).

III. STATEMENT OF THE CASE

Petitioner is the widow of George A. Bolles, who died in 1933. Respondent is the executor of George A. Bolles' will.

The record shows without dispute facts which the Court of Appeals held (R. 340) equitably entitled petitioner to securities of the appraised value of $213,515.00, as the beneficiary of an express (R. 3) or constructive (R. 8) trust, resulting from the conduct and statements of her husband.

After Mr. Bolles' death, in August, 1933, petitioner permitted an officer of the respondent-executor to accompany her to a safety deposit box in which the securities now in dispute had been lodged for her benefit by her husband (R. 110) and to which he had arranged she should have separate access (R. 444, 445, 466). When she opened the box this official demanded and took possession of its contents, notwithstanding petitioner's assertion of ownership (R. 317), and the executor thereupon listed the securities in the box in its inventory as a part of the assets of the estate of the decedent Bolles (R. 75, 399, 400). The securities so taken from the box and listed stood in the name of George A. Bolles without endorsement (R. 316).

Petitioner on April 6, 1934 (R. 412), in pursuance of Section 10509-59, Ohio General Code (Appendix, page 54), filed exceptions in the Probate Court to the executor's inventory asserting that the securities were wholly owned by her as the result of a gift *inter vivos* of the legal title from her husband. The Supreme Court of Ohio reversed decisions of the Courts of Common Pleas and Appeals in favor of petitioner on her exceptions. The Supreme Court held that the case involved only the question whether a valid gift *inter vivos* of the *legal title* had been consummated and that the exceptions must be overruled on the sole ground that delivery had not been made to petitioner such as was necessary to vest her with *legal* title. *Bolles vs. Toledo Trust Company*, 132 O. S. 21, 4 N. E. 2d 917. The Supreme Court said:

> "* * * there can be little doubt that he intended his wife to have the securities and thought he had effectuated such desire, * * *." (P. 30, 132 O. S.)

and

> "* * * Such testimony unmistakably carries the conclusion that Mr. Bolles *considered he had made a gift* of securities he owned at certain times. But wherein does it divulge compliance with the procedure and requirements which the law says are essential to the completion of a valid gift *inter vivos?*" (Pp. 28, 29.) (Italics ours.)

Thereafter, on May 8, 1937 (R. 3), petitioner filed the present suit in equity in the Court of Common Pleas, a court of general equity jurisdiction, and alleged (a) that the legal title to the property held by the executor was subject to an express trust in her favor (*Cleveland Trust Company vs. White,* 134 O. S. 1 (1938), and *Streeper vs. Myers,* 132 O. S. 322 (1937)), and, in the alternative, (b) that a constructive trust should be impressed upon said property for her benefit (*Crooks vs. Crooks,* 34 O. S. 610 (1878), and *Hout vs. Hout,* 20 O. S. 119 (1870)). Petitioner prevailed in the Court of Common Pleas and the Court of Appeals, but lost in the Supreme Court, which court sustained respondent's claim that the proceedings on the exceptions to the inventory were *res judicata* as to petitioner's claims of express trust and constructive trust, and did not pass on the merits of either claim. (Judge Hart, who was not a member of the Supreme Court when the former case was decided, dissented.)

Thereupon petitioner filed a timely application for rehearing asserting her contention, hereinafter discussed, that the decision of the Supreme Court of Ohio retroactively changed the law of Ohio so as to deprive petitioner of any hearing and any opportunity for hearing upon the merits of her equitable claims in violation of

the rights secured by the Fourteenth Amendment to the Constitution of the United States (R. 497). The Supreme Court of Ohio denied petitioner's application for rehearing without further opinion (R. 476).

IV. SPECIFICATION OF ERRORS

The Supreme Court of Ohio erred and denied petitioner due process of law in holding,

(a) That petitioner is barred from enforcing her equitable rights in this or any other proceeding because she did not attempt to enforce them by her exceptions to the inventory in Probate Court, a court and manner *in which they were unenforcible, for lack of jurisdiction, under the decisions of the Supreme Court of Ohio, in effect at the time petitioner's exceptions to the inventory were still open for consideration.*

(b) That it was petitioner's duty to plead her equitable rights in addition to her legal rights on exceptions to the inventory and that her failure to do so barred her equitable rights, such holding being contrary to the law of Ohio, as settled by decisions of its Supreme Court in effect at the time her exceptions were heard, that a claim of legal title and a claim of equitable title or right are separate claims or causes of action, and that the decision of one such cause of action is not a bar to the other.

(c) That petitioner's equitable rights were barred by the decision in the former case, such holding being contrary to the law of Ohio, settled by decisions of the Supreme Court of that state, in effect at the time petitioner's exceptions were heard in the former case, that she might seek one remedy to enforce a supposed right,

and, failing in that (by reason of the non-existence of the supposed right) might then seek a different remedy to enforce a different right, without being barred under the principles of *res judicata* by the decision in the former proceedings.

(d) That petitioner, notwithstanding she called to the attention of the Supreme Court of Ohio by application for rehearing that its decision denied her due process of law in violation of the Fourteenth Amendment, as herein set forth, was not entitled to a rehearing and a determination of the merits of her equitable claims.

V. ARGUMENT UPON QUESTIONS PRESENTED

Summary of Argument

A summary of the argument will be found beginning on the first page of the subject index to this brief.

1. A Decision of a State Court of Last Resort, Which Denies a Party Any Hearing and Any Opportunity for Hearing on the Merits of His Cause of Action, Is a Violation of His Rights Under the Fourteenth Amendment, and Such Decision Is, Accordingly, Subject to Review By This Court.

The decision of this court in *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673, establishes this rule. There the State Supreme Court, notwithstanding its prior holdings that relief under the Fourteenth Amendment could not be granted by the State Tax Commission against a discriminating state tax, held that a suit in equity to enjoin the collection of certain

taxes must be dismissed because the taxpayer had not first sought relief from the State Tax Commission. In its opinion, by Mr. Justice Brandies, this court, after pointing out that the State Supreme Court had in its earlier cases decided that the Tax Commission did not have jurisdiction of such questions, said of the effect of the decision in the pending case,

> "* * * Then it was too late for the plaintiff to avail itself of the newly found remedy. For, under that decision, the application to the Tax Commission could not be made after the tax books were delivered to the collector; * * *." (P. 677.)

Just so, in the case at bar it was too late for petitioner to avail herself of the newly discovered jurisdiction of the Probate Court after the decision in the case at bar was handed down as the proceedings under exceptions to the inventory had long been finally terminated by the decision of the Supreme Court and the statutory period for filing exceptions had long expired (Sec. 10509-59, Ohio General Code, Appendix, page 54).

This court further said:

> "* * * We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> * * * * *
>
> "* * * The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available and which is not now open to it. Thus, by denying to it the only remedy ever available for the en-

> forcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.
>
> "*Second.* * * * The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.
>
> * * * * *
>
> "* * * while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. * * *" (Pp. 678, 679, 680, 682.)

We submit there is an exact parallel between what happened in the *Brinkerhoff-Faris Trust case* and in the case at bar. Thus, until April 24, 1940, when the opinion in the case at bar was filed, "it would have been entirely futile for the plaintiff to apply" to the Probate Court to grant on exceptions to the executor's inventory the equitable relief which she sought herein as is shown by the authorities hereinafter cited. Since April 24, 1940, the Probate Court cannot grant such relief to plaintiff because the time in which that court could act on petitioner's exceptions has long expired. Petitioner is denied a hearing herein on the merits of her equitable rights because she "did not first seek" a judicial remedy in Probate Court "which, in fact, was never available and which is not now open to" her. Therefore, at no time did the state provide to petitioner a remedy by which her equitable rights and title could be enforced as against the

respondent-executor. If the present judgment is permitted to stand, plaintiff will have been deprived of her equitable rights without ever having had an opportunity to have them finally adjudicated, and the adjudication thereof by the Court of Appeals in her favor is nullified.

This court again recognized its right to review the judgment of a state court denying due process of law in this way in the case of *Herndon vs. Georgia*, 295 U. S. 441 (1935).

2. The Decision of the Supreme Court of Ohio Has Denied Petitioner Any Hearing and Any Opportunity for a Hearing on the Merits of Her Equitable Claims.

A. Petitioner Could Not Have Had a Hearing in the Probate Court on the Merits of Either of Her Equitable Claims on Her Exceptions to the Inventory Because Under the Decisions of the Supreme Court and Courts of Appeals of Ohio Then in Effect, the Probate Court Then Had No Jurisdiction of Such Equitable Claims in That Proceeding.

As shown by the authorities hereinafter cited, the Probate Court in Ohio has always been a court of limited jurisdiction. It has always had some equitable powers, but has never been a court of general equity jurisdiction. Both before and after the adoption of the Probate Code in 1932 the court had jurisdiction over only such matters as was conferred upon it by statute (Article IV, Section 8, Constitution of Ohio (Appendix, page 49)), and such as was necessarily incident thereto.

Section 10501-53, Ohio General Code (Appendix hereto, page 50), is the controlling section. It does not give the Probate Court authority over trusts and trustees (except testamentary trustees). It does, however, authorize the Probate Court,

> "3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates";

and in so doing the court has "plenary power at law and in equity fully to dispose of any matter *properly* before the court," (see last paragraph, Section 10501-53). (Appendix, page 50) (Italics ours.)

The primary question here, therefore, is whether the Probate Court, by virtue of this section, could (prior to the present decision), on exceptions to an executor's inventory, exercise the powers of a court of general equity jurisdiction and hear and determine questions, such as are the basis of the present suit, (a) as to the existence of an express trust affecting the inventoried property, and (b) as to whether equitably a constructive trust should be impressed upon such property.

Except the decision in the present case, the decisions in Ohio are uniformly to the effect that the Probate Court is without jurisdiction to hear and determine such questions.

In order to demonstrate the lack of jurisdiction of the Probate Court of such matters, under the law of Ohio, as it stood prior to the present decision, it will be helpful to consider how such trust issues had been classified in Ohio for judicial consideration, and whether claims of such character could "properly" come before the Probate Court and be determinative of exceptions to an in-

ventory. For convenience we shall discuss this subject under separate headings numbers (1), (2), (3), (4), (5) and (6), following.

(1) It Was the Law of Ohio That Trusts and the Rights of Beneficiaries of Trusts Were "Peculiarly Within the Province" of the Court of Common Pleas, That Being a Court of General Equity Jurisdiction, and That Suits, Such as This, Constituted Equity or Chancery Cases Under Section 6, Article IV, of the Constitution of Ohio, and As Such Were Triable DE NOVO in the Court of Appeals.

Section 4 of Article IV, of the Constitution of Ohio, (Appendix page 49), provides that, "The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law."

The Ohio General Code provided at the times involved in this proceeding:

> "The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace * * *." (Sec. 11215, Appendix page 54.)

and

> "There shall be but one form of action, to be known as a civil action. This requirement does not affect any substantive right or liability, legal or equitable." (Sec. 11238, Appendix page 55.)

The Court of Common Pleas is therefore the Ohio court which has initial general equity jurisdiction and accordingly the Ohio courts have uniformly held that suits to compel trustees to perform the duties of their trusts are peculiarly within its jurisdiction.

In *Caldwell vs. Caldwell*, 45 O. S. 512, (1888), the plaintiff was the beneficiary of a trust set up by a will and *brought his suit in the Court of Common Pleas* against the administrator, claiming the property (which had been purchased by the administrator) was still subject to the trust and seeking its resale. The Supreme Court held the suit had been properly brought in the Court of Common Pleas and in its opinion said in part:

> "* * * The theory of the plaintiff's case, is that to the extent of these lands, the trust confided to the defendant has never been executed, and that he now holds them, subject to administration, and in trust for the beneficiaries, of the will of the testator; that he refuses to proceed with the execution of such trust, claiming to be the absolute owner in fee, in his individual right, of these lands, wherefore the plaintiff seeks to compel the execution of such trust. Upon this theory, if properly assumed, he sought the proper tribunal—the court of common pleas. *The probate court affords no remedy to a party seeking to set aside such conveyance, so as to compel an administrator, executor, or testamentary trustee, to perform a trust which he refuses to execute. This is peculiarly within the province of a court of general equity jurisdiction* * * *." (P. 521)* (Italics ours.)

In *Brinkerhoff, Trustee vs. Smith et al.*, 57 O. S. 610 (1897), the action was commenced in the Court of Common Pleas. An agreement to hold certain property in trust was involved. The court said, syllabus three:

> "An action to enforce the trust is a civil action, equitable in its nature and governed by the provisions of the code of civil procedure. * * * The

* In Woerner's "The American Law of Administration," Vol. 1, page 508, the author cites this case as authority for the proposition that Probate Courts possess no power "over any purely equitable right."

action being properly cognizable in equity, the court in which it is pending, possesses in regard to it the general jurisdiction that appertains to courts of equity, and may hear and determine every issue of law or fact joined between the parties, * * * and its determinations, as in other cases, are conclusive."

Gilbert vs. Sutliff, 3 O. S. 129 (1853), in which that court said, page 148:

"* * * The jurisdiction of courts of equity over trusts and trustees is plenary. * * *"

Berkmeyer vs. Kellerman, 32 O. S. 239 (1877):

"It is the peculiar province of equity to take cognizance of transactions growing out of relations of trust, and to prevent those holding such positions from using them and their influence for their own aggrandizement." (Syl. 1.)

Madden, Exr., vs. Shallenberger, 121 O. S. 401 (1929).

"Except as restricted by statute, the Court of Common Pleas has such jurisdiction in equity as Courts of Chancery had at common law. Courts of Chancery at common law had jurisdiction of trustees, beneficiaries of trusts and trust estates." (Syl. 1.)

The Court of Appeals for Allen County in *Huntington National Bank vs. Fulton*, 49 O. A. 268 (1934), (under the present Probate Code), said, pages 276, 277:

"It was not within the jurisdiction of the Probate Court to engraft or enforce trusts or liens on the funds of the trust company, as the Probate Court is not vested with general equitable jurisdiction authorizing it to engraft or enforce such trusts or liens, * * * The Common Pleas Court has jurisdiction not only in the matter of the al-

> lowance of claims against banks in process of liquidation, but has general equitable jurisdiction as well, and is the only court in which the relief sought in this action could be granted, * * *."

An important factor in connection with the classification of the claims to enforce express and constructive trusts as chancery suits coming under the original jurisdiction of the Court of Common Pleas is that being chancery suits the Court of Appeals has "appellate jurisdiction" on them, *i.e.*, they are appealable to and triable *de novo* in the Court of Appeals by virtue of Section 6, Article IV, of the Constitution of Ohio. (Appendix page 49.)

> "In a chancery case in the Court of Appeals, the parties have a constitutional right to have their case tried *de novo*, being permitted to introduce competent evidence under the legal rules applicable in the trial of questions of fact in trial courts." (Syl.) *Kiriakis vs. Fountas*, 109 O. S. 553 (1924)

The present case, being such a chancery case, was so appealed by Respondent, and tried de novo in the Court of Appeals.

(2) It Was the Law of Ohio That the Probate Court Was Not a Court of General Equity Jurisdiction and Had Only Such Equity Powers As Had Been Given It for Specific Purposes, and Such As Are Necessarily Incident Thereto, and Had No Jurisdiction Over Trusts and the Rights of Beneficiaries of Trusts.

It is not only true, as just shown by section (1) above, that it was the law of Ohio that such trust ques-

tions as are here involved were peculiarly within the province of the Court of Common Pleas, but it was further true that the Probate Court had *no* jurisdiction thereof.

As stated in *Caldwell vs. Caldwell*, 45 O. S. 512-521 (1888), *supra*:

> "* * * * The probate court affords no remedy to a party seeking to set aside such conveyance, *so as to compel an administrator, executor, or testamentary trustee, to perform a trust which he refuses to execute.* This is peculiarly within the province of a court of general equity jurisdiction. * * *" (Italics ours.)

In *Gilliland vs. Sellers*, 2 O. S. 223 (1853), the Supreme Court said, "The decree of a probate court in Ohio, involving the exercise of the general jurisdiction of a court of equity, must be considered as *coram non judice* and void," and accordingly held that a decree of the Probate Court of cancellation of a mortgage in proceedings to sell land of an intestate was void.

In *State ex rel. Black, Executor, vs. White, Judge*, 132 O. S. 58 (1936), the question was whether the Probate Court or the Court of Common Pleas had jurisdiction of a suit for specific performance of a contract for the sale of real estate by executors of an estate being administered by the Probate Court. The court held that the suit was within the jurisdiction of the Court of Common Pleas, that "being a court of general equity jurisdiction" paragraph five, syllabus) and said of the Probate Court, page 66:

> "* * * The Probate Court is a court of limited jurisdiction, having only such power as is conferred upon it by the constitution and statutes of

> Ohio, and has not the inherent general jurisdiction of common-law and chancery courts. 37 Ohio Jurisprudence, 177, Section 159.
>
> "There is no question that the General Assembly of Ohio has in certain instances delegated equitable jurisdiction to the Probate Courts, but a careful perusal of all these grants of jurisdiction fails to disclose the delegation of power to entertain suits for specific performance. * * *"

The court then quoted as still applicable its statement in *Gilliland vs. Sellers,* 2 O. S. 223, above set forth. The *Black case* arose after the adoption of the present Probate Code of Ohio in 1932, and the decision therein clearly shows the adoption of the code did not enlarge the subject matters over which Probate Courts have jurisdiction.

In *Goodrich, Admr., vs. Anderson,* 136 O. S. 509 (decided April 24, 1940, the same day as the case at bar), the question was whether the Probate Court had power to render a money judgment in an action under Sections 10506-67, *et seq.,* of the Ohio General Code (Appendix page 51) relating to proceedings to discover concealed or embezzled assets, which sections are a part of the present Probate Code. The court held it had no such jurisdiction, and said in the opinion, page 511:

> "The character of the proceeding is the same in the Court of Common Pleas as in the Probate Court. It is special and does not come within the orbit of a civil action for money only. While the authority of the court under such a proceeding is very broad for the purpose of discovering concealed or embezzled assets, it is not broad enough to litigate all the issues in the instant case, where the ultimate objective is a money judgment and where there has been no concealment of assets. *To*

that extent there is a limitation upon the 'plenary power' granted to Probate Court in the last paragraph of Section 10501-53, *General Code.* * * *

"* * * The proceeding is special and designed to facilitate the administration of estates, but *it may not be used primarily as a substitute for a civil action for a money judgment wherein pleadings are required properly to define the issues.*" (Pp. 511, 512.) (Italics ours.)

By the same reasoning it would seem to follow that exceptions to an executor's inventory, being also a "special" proceeding "designed to facilitate the administration of estates," "may not be used primarily as a substitute for a civil action" for the enforcement of trust rights such as are here involved, and such, as we show herein, was the law of Ohio prior to the present decision.

What the court said in the *Goodrich case* is, we submit, the direct opposite of what was said by the same court on the same day in the present case, page 521, as follows:

"Plaintiff insists, however, that a case on exceptions to an inventory is a special statutory proceeding at law and only questions of legal title may be considered. This view is not broad enough. Of course the Probate Court exercises limited jurisdiction and on appeal and trial *de novo* the jurisdiction of the Court of Common Pleas would not be extended beyond that of the court below. Nevertheless the Probate Court is vested with full power to determine what property is lawfully included in an inventory as assets and as incidental thereto has jurisdiction to inquire whether inventoried personal property belongs to an exceptor as the beneficiary of a trust. Under Section 10501-53, General Code, the Probate Court has 'plenary power at law and in equity fully to dispose of any matter properly before the court,'

> unless otherwise provided by statute. Compare *Goodrich, Admr., vs. Anderson, ante,* 509. There is no statutory provision which limits or denies to that court power to hear and determine fully and completely all questions raised by exceptions to an inventory of the assets of a decedent's estate. The application of the doctrine of *res judicata* is not narrowed herein because the court of origin was not invested with general jurisdiction." (*Bolles vs. Toledo Trust Co.,* 136 O. S. 517-521.)

But, as hereinafter shown, (Sections (4), (5) and (6) following) exceptions to an executor's inventory, under the prior decisions of the Supreme Court, did not bring "properly before the court" or involve at all, questions as to equitable rights of third persons, in the property of the decedent because it is the duty of the executor to administer and account for such property and hence such property is lawfully included in an inventory as "assets" notwithstanding the existence of such questions.

Other cases showing the limited jurisdiction of the Probate Court are *Saxton vs. Seiberling,* 48 O. S. 554 (1891), holding that the Probate Court had no power to set aside a deed of conveyance made in pursuance of its own order of sale on the ground that the sale was tainted by fraud; *First National Bank vs. Beebe,* 62 O. S. 41 (1900), holding that a Probate Court in making an order of distribution had no jurisdiction to determine the persons to whom the distribution should be made; *Vandenbark vs. Mattingly,* 62 O. S. 25 (1900), holding that the Probate Court does not have jurisdiction of an action in the nature of a creditor's bill brought under authority of Section 5464 of the Revised Statutes because of the pen-

dency in that court of a petition for an order to sell lands by an assignee for the benefit of creditors.

In *Halloran vs. Merritt, Admr.*, 48 O. A. 135 (1934), a proceeding to recover embezzled assets, the court said:

> "* * * As presented, the proceedings assumed the character of a suit in equity, whereas in fact the proceedings were special and summary in nature, not a civil action within the meaning of the code, and were limited to the purposes specified in the statute. Moreover the Probate Court is a court of limited jurisdiction, and the limited purposes of the complaint were not enlarged by the filing thereof and the hearing had thereon in the Court of Common Pleas." (P. 137.)

Thus it appears that the courts of Ohio have held with uniformity, except in the case at bar, that matters which are proper for consideration only by a court of general equity jurisdiction in a chancery case are not properly brought before the Probate Court (especially by a "special proceeding" therein, such as exceptions to an inventory), and are not within its jurisdiction, unless *expressly* placed there by statute, notwithstanding the fact that it has, under Section 10501-53, Ohio General Code (Appendix, page 50), "plenary power * * * in equity fully to dispose of any matter *properly* before the court." (Italics ours.)

As the decisions herein cited show, this statutory provision did not make the Probate Court a court of general equity jurisdiction or enlarge the "matters" which might be brought before the court. It merely gave power "fully to dispose" of such matters as are *properly* brought before the court. There is no express statutory authority granted to Probate Court to hear and determine trust questions such as those in this case.

(3) It Was the Law of Ohio That Proceedings on Exceptions to an Account (Held by the Supreme Court of Ohio Herein To Be RES JUDICATA of This Chancery Case) of an Executor Are Special Statutory Proceedings and Are Not Equity or Chancery Cases Under Section 6, Article IV, of the Constitution of Ohio, and are Not Triable DE NOVO in the Court of Appeals.

We have for consideration here not only the law of Ohio, as it was prior to the present decision, with respect to the general jurisdiction of the Probate Court, but also the narrower question as to its then jurisdiction on exceptions to an executor's inventory.

It was the law prior to the decision herein, that such equitable matters as are involved herein did not come within its jurisdiction on such proceedings. As we have shown in Section 1 such suits as this are "chancery cases" appealable for trial *de novo* to the Court of Appeals, but this is not true of exceptions to an executor's inventory or other account. The Supreme Court of Ohio so held in *In re Estate of Gurnea*, 111 O. S. 715 (1924), syllabus paragraphs 1 and 2:

> "1. The settlement in the Probate Court of the account of an executor does not constitute a chancery case.
>
> "2. The appeal to the Court of Common Pleas of the settlement of the account of an executor in the Probate Court is purely statutory and does not constitute a chancery case; hence the judgment of the Court of Common Pleas upon such an appeal from the Probate Court is not appealable to the Court of Appeals under Section 6, Article IV, of the Constitution of Ohio."

See to the same effect *In re Estate of Chapman*, 13 O. A. 186 (1920).

Thus exceptions to an account or to an inventory of an executor may not be appealed to and tried *de novo* in the Court of Appeals because proceedings on such exceptions do not constitute a chancery case, but the present case, being a chancery case, *was so appealable and was so appealed* (by respondent) *and tried de novo in the Court of Appeals.*

Therefore, since (a) trust claims such as we have here constitute a chancery case, and (b) proceedings on exceptions to an inventory do not constitute a chancery case, it follows that *on exceptions to an inventory* the Probate Court could not have and does not have jurisdiction of such trust claims as were raised in the present case.

Also, it follows, since (a) suits such as this are appealable for trial *de novo* to the Court of Appeals, and (b) exceptions to an inventory are not so appealable to the Court of Appeals, that petitioner's rights asserted in this suit were not the proper subject of exceptions or within the limited jurisdiction of the Probate Court on hearing of exceptions as it had been defined by the Supreme Court of Ohio at the time petitioner's exceptions were filed and heard.

(4) It Was the Law of Ohio That the Probate Court Did Not Have Jurisdiction on Exceptions to an Executor's Inventory and Analogous Proceedings to Hear and Determine Questions of Equitable Title or Right Between the Executor and the Exceptor Because It Was the Executor's Duty to Inventory All Property in Which Its Testator Had Any Interest.

The Probate Code, G. C. Section 10509-41 (Appendix, page 52), as in effect at the time here involved, required every executor or administrator to make and return on oath into court,

> "* * * a true inventory of the real estate of the deceased, and of the goods, chattels, moneys, rights and credits of the deceased, by law to be administered, and which have come to his possession or knowledge, * * *."

Section 10509-51, General Code (Appendix, page 53), provided,

> "The inventory shall contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money, belonging to the deceased, known to such executor or administrator, specifying, * * *."

Section 10509-52, General Code (Appendix, page 53), contained a similar provision as to debts and accounts belonging to the deceased. Section 10504-71 (Appendix, page 51), provided:

> "*Any* estate, right or interest in lands or personal estate or other property of which the decedent was possessed at his decease shall pass under the will unless the *will* manifest a different intention." (Italics ours.)

The foregoing sections of the statutes clearly indicate that the policy of this state was that "any" legal or equitable interest which the decedent has in property shall be included in the inventory. This is emphasized by the amendment to Section 10509-41 adopted in 1935 (Appendix, page 52) by which it is provided as to real property *without* the state, the executor shall file a "separate schedule describing *any* legal or equitable interest" the decedent had therein. Clearly the legislature must have regarded Sections 10509-41 and 51 (Appendix, pages 52 and 53) as they stood to prescribe this same duty as to property *within* the state. In Addams & Hosford's authoritative work entitled "Ohio Probate Practice and Procedure," 2nd Ed., it is said, page 743:

> "Importance of the inventory. * * * The taking of a proper inventory is one of the most important duties devolving upon an administrator or executor in the discharge of his trust. It is important to him because it shows, or should show, just exactly what property is to be administered, and the probable value of it. In a controversy with an heir or creditor, it is invaluable to him as showing these facts, and thus prevent him from being charged for that which may never have come into his possession. To the heir, creditor or other interested person in the estate it is alike invaluable, for if there is no inventory, or if the inventory be an improper one, no information is given to the heir or creditor as to what the administrator ought to be properly charged with. It also follows that great care should be exercised in having all the assets of the estate enumerated, and likewise a value fixed thereon. * * *"

At page 749 of the same work it is said:

> "* * * Property claimed by another, but found among the assets of the estate, must be inventoried unless it clearly appear that such property does not belong to the deceased."

From the foregoing, it seems clear that exceptions to the inventory were not intended to be the means for the adjudication of claims for less than the full legal and equitable title to the inventoried property, as it is the *duty* of the executor under the express wording of the statutes to include in his inventory any property which comes into his possession or to his knowledge in which the testator had *any* legal or equitable right. The claim that there was an outstanding equitable title would therefore be immaterial on the hearing of the exceptions and such claim could not "properly" be adjudicated on such proceedings. The decisions of the courts of Ohio, except in the case at bar, are in accord with this statement. Thus in *Keever vs. Brown, Executrix*, 36 O. A. 1 (1930), it was held:

> "* * * while the Probate Court was right in requiring the executrix to cause her inventory to show the statutory setoffs to the widower, his order in that respect does not constitute an adjudication of the question whether the particular widower has by ante-nuptial contract or otherwise barred himself from taking the property so nominally set off to him." (P. 8.)

The Court of Appeals quoted in support of that conclusion from a prior unpublished opinion of the same court in *Connolly vs. Connolly* in part as follows:

> "'We conclude, therefore, the Probate Court was without jurisdiction to determine the validity of the contract between Connolly and wife in so

> far as it might affect the latter's right to an allowance either one way or the other, and therefore erred in holding, as it did, that the contract was a bar to this right. * * *'" (36 O. A. 8.)

In so holding in the *Connolly case* the court expressly stated that it was bound by and was following the decision of the Supreme Court in *Baldwin vs. Broadstone*, 54 O. S. 653, 46 N. E. 1155 (1896), unreported, as shown by the synopsis of points there decided set forth in 35 Ohio Law Bulletin, page 161. Point 1 of that synopsis reads:

> "The Probate Court has no jurisdiction of the question to set aside the year's allowance to a widow, on the ground that she agreed not to ask it by ante-nuptial contract."

In *Juhasz vs. Juhasz*, 134 O. S. 257 (1938), the court had before it the direct question of the jurisdiction of the Probate Court on exceptions to an inventory under the present Probate Code. There the executor in inventorying the property had failed to set off the statutory exemptions and year's allowance to the widow because an ante-nuptial agreement incorporated in the will purported to bar the widow therefrom. The Supreme Court held that the Probate Court had properly held that it did not have jurisdiction to pass upon such questions on exceptions to the inventory.

See also *Goodrich, Admr., vs. Anderson*, 136 O. S. 509 (April 24, 1940), (*supra*); *Richardson vs. Richardson*, 28 O. L. A. 497 (1938), (Court of Appeals, Medina County).

In re Trust Created Under Will of Joseph B. Rich, 3 O. O. 315 (1935), (decided by the Probate Court of Franklin County), it was said, referring to sub-paragraph

13 of Section 10501-53, Ohio General Code (Appendix, page 50), defining the jurisdiction of the Probate Court:

> "In regard to the last paragraph referred to, in which the Probate Court is given plenary power, it is our opinion that this refers and is restricted to the specific jurisdiction given in the paragraphs immediately preceding it. In other words, the Probate Court has plenary power in law and in equity in matters over which it has specific jurisdiction as set forth in the statute, and conversely if the authority is not specifically given the Probate Court has no such authority. * * * We fail, however, to find any specific authority in the above mentioned statute to terminate a testamentary trust, and had the legislature so intended it would have so worded the statute that specific authority would have been given." (P. 316.)

Section 10501-53, Ohio General Code, is set forth in full in the Appendix hereto, page 50. It will be searched in vain for any suggestion that authority has been given to the Probate Court to enforce the rights of beneficiaries of express trusts (not testamentary) or to engraft constructive trusts upon property in the possession of executors.

That the trust here in question was not a testamentary trust is clear:

> "When a settlor creates an effective trust in his lifetime, the disposition is not testamentary because there is to be no application of the property to charitable or other purposes until after his death. * * *" *Cleveland Trust Co. vs. White*, 134 O. S. 1-7.

The Supreme Court of Ohio, in its opinion herein, ignored and in effect overruled without comment the foregoing decisions which, while in effect, directly estab-

lished that the Probate Court did not have jurisdiction on exceptions to the inventory to pass upon petitioner's present equitable claims and on which petitioner was entitled to rely in refraining from asserting her equitable claims in support of her exceptions.

We think it appears that at the time the petitioner's exceptions were before it in the former case, the Supreme Court itself must then have been of the opinion that petitioner's equitable rights could not be raised in support of her exceptions in that proceeding because it entered final judgment therein, because of insufficient evidence of delivery, although it is the settled law of Ohio that where an appellate court reverses a case on the weight of the evidence,

> "* * * the defendant in error is *entitled* to a remand, *to afford an opportunity for an amendment of the pleadings,* or the production of additional evidence, if any, to cure the defects in the record of the former trial." (*Bank vs. Shadyside Coal Company,* 121 O. S. 544 (1930), syllabus 3.) (Italics ours.)

Petitioner, as appellee in the former case above cited, filed two applications in the Supreme Court urging that it remand that case for further proceedings, and specifically called the court's attention to the rule of *Bank vs. Shadyside Coal Company, supra,* but the court declined so to do and entered final judgment. It seems reasonable to assume that it would not have thus ended all opportunity for petitioner to present her equitable claims by amending her exceptions to the inventory if the court had then entertained the view that that was a proper proceeding for their adjudication.

(5) It Was the Law of Ohio That an Executor Succeeds to the Title and Trust Duties of His Testator as to Property Held in Trust, and Hence it is an Executor's Duty to Inventory and Administer Such Property in Accordance With Law, and, Accordingly, on Exceptions to an Inventory the Probate Court Had No Jurisdiction to Determine the Existence or Non-Existence of a Trust.

As shown in Section (4) hereof, by Section 10509-41, Ohio General Code (Appendix, page 52), it is made the duty of the executor to list in the inventory,

> "* * * the goods, chattels, moneys, rights and credits of the deceased by law to be administered, and which have come to his possession or knowledge, * * *."

The securities which are here in question all stood of record in the name of respondent's testator at the time of his death and were unendorsed. (R. 316.) There was no written assignment or declaration of trust. The existence of such securities came to the knowledge of the executor and it took possession of them. Thereupon it became the express duty of the executor, by virtue of Section 10509-41, (Appendix, page 52) to list such securities in its inventory, and this regardless of whether they were the subject of an express trust or of a possible constructive trust.

In *Dayton vs. Bartlett*, 38 O. S. 357 (1882), the surviving partner of a partnership died, and the court, speaking of his executor, and of such surviving partner's estate, said, page 364,

"As an incident to the settlement of that estate, he must settle the partnership estate. He cannot accept the former duty without having the latter imposed upon him, unless equity, for sufficient reasons, appoints a receiver or trustee to settle the partnership separately, and relieves him from this incidental trust. Unless he is relieved from this trust by agreement of the parties, or by a competent court, it is part of his official duty as representative of the survivor to wind up the partnership, and ascertain and distribute the surplus or liability of the deceased partners before he can finally settle the individual estate. * * *

* * * * *

"* * * he" (the deceased surviving partner) "was a trustee of the firm. Upon his death, the law cast that duty upon his personal representative, not as owner of the property, but as a trustee in possession, acting for the estates of all the deceased partners." (Pp. 364, 365.)

In *Deering Harvester Company vs. Keifer*, 20 O. C. C. 311 (Circuit Court of Hancock County, 1900), it appeared that an agent of the Harvester Company, in violation of his contract with it had intermingled funds belonging to it with his own funds and used the money for the purchase of goods for his store and in paying its operating expenses. He then died. The court said, syllabus 2:

"And in such case, if the agent dies insolvent leaving the amount due his principal unpaid, said stock of goods into which the trust funds can be traced, passes to the administrator of his estate impressed with the trust, and the court may order the administrator to allow and pay as a preferred claim, the debt so due the principal, from the proceeds of the sale of said stock. * * *"

The rule followed by the above Ohio authorities is one generally recognized.

Cazallis et al. vs. Ingraham et al., 110 Atl. 359 (Supreme Judicial Court of Maine, 1920);

Boyer et al. vs. Decker, 40 N. Y. S. 469 (Supreme Court, Appellate Division, 1896);

Gulick's Adm'rs vs. Bruere, Trustee, etc., 9 Atl. 719 (Court of Errors and Appeals of New Jersey, 1887);

Kauffman et al. vs. Foster, 86 Pac. 1108 (Court of Appeals, California, 1906);

Boone vs. Citizens' Savings Bank, 38 Am. Rep. 498; 84 N. Y. 83;

Tyler vs. Mayre et al., 27 Pac. 160, 30 Pac. 196 (Supreme Court of California);

In re Thurston, 145 Atl. 110 (Prerogative Court of New Jersey, 1929);

Friedley et al. vs. Security Trust & Safe Deposit Co., 84 Atl. 883 (Court of Chancery, Delaware, 1912).

The foregoing Ohio authorities show that the existence of petitioner's claims of express and constructive trusts, did not affect the duty of the executor to inventory these securities. If there was an express trust, the executor became the successor trustee, charged with the duty of carrying out the trust. If there were no express trust, but the circumstances were such that a constructive trust should be equitably engrafted upon the securities, the executor took them subject to the liability

that that might be done, but in either case he was accountable for them and required to inventory them, since in either case, the legal title having been in its testator at the time of his death, they would be "goods and chattels * * * of the deceased, by law to be administered" under Section 10509-41 O. G. C. (Appendix, page 52). In view of the decisions hereinbefore cited, and of the statutory duty of the executor, it is clear that the executor in the case at bar properly included the securities in question in the inventory and that it would have been his duty to do so, even though he had been of the opinion that they were subject either to an express or a constructive trust, for they were still, in either event, assets of the estate by law to be administered, either by distribution to the distributees under the will, if there were no trust, or to the beneficiary of the trust, if there were a trust.

The respondent claimed in the courts below that the case of *Quinby vs. Walker*, 14 O. S. 193 (1863), holds that an executor does not have to inventory or account for property held by his testator in trust. If the case so held it would no longer be authoritative in Ohio because of the later decision in *Dayton vs. Bartlett*, 38 O. S. 357 (1882, *supra*). In fact, however, it does not so hold. There the property, which came into the possession of a person who was an executor, had never been in the possession of his testator. The court points out that the executor did not obtain possession of the property as such, but as a trustee under a voluntary assumption of duties outside of his duties as executor.

From the foregoing, it follows (a) that it was the law of Ohio (prior to the decision herein), that a claim of express or constructive trust would not sustain ex-

ceptions to the executor's inventory, because, even if such claims were valid, it was, nevertheless, the executor's duty to inventory the property, (b) that, therefore, exceptions to an inventory would not "properly" bring before the court any question with respect to such trust claim, and (c) that accordingly the Probate Court had no jurisdiction of such question and no bar with respect thereto could arise from the decision on the exceptions.

(6) It Was the Law of Ohio That a Constructive Trust Is Purely a Creature of Equity and Consequently a Probate Court Had No Power to Impress a Constructive Trust, on Hearing of Exceptions to an Inventory, and, Hence, a Claim of Constructive Trust Could Not Be Barred by Decision on Exceptions.

Although in its *opinion* the Supreme Court of Ohio does not refer to petitioner's claim of constructive trust, it nevertheless entered final *judgment* against her dismissing that claim as well as her claim of express trust. (R. 476.) In its opinion the Supreme Court merely said:

> "The alleged trust is based upon a claimed agreement or understanding between her" (the petitioner) "and her late husband, * * *." (P. 517.)

This clearly refers only to petitioner's claim of express trust.

The Court of Appeals decree sustained both petitioners' claim of an express trust and her alternative claim of a constructive trust (opinion, R. 481), and

found "upon the issues joined in favor of the plaintiff-appellee in all respects." (R. 340).

It has long been the settled law in Ohio that if the right result is reached in a lower court the Supreme Court will affirm, regardless of whether in its opinion the right reason was assigned by the court below.

Hawver vs. Whalen, 49 O. S. 69 (1892);
Dayton vs. Goldsberry, 84 O. S. 454 (1911).

The effect of this *judgment* of the Supreme Court of Ohio was clearly to deprive petitioner of any possible opportunity ever to have had her claim of constructive trust adjudicated anywhere.

Petitioner's claim of constructive trust was not a title to or even an interest in the property involved. It was, until sustained by some court of competent jurisdiction, a mere cause of action.

A constructive trust is purely a creature of equity.

Hout vs. Hout, 20 O. S. 119 (1870);
Crooks vs. Crooks, 34 O. S. 610 (1878);
Klaustermeyer vs. Cleveland Trust Company, 89 O. S. 142 (1913).

As stated by Mr. Justice Cardozo for the Court of Appeals of New York in *Beatty vs. Guggenheim Exploration Co.*, 225 N. Y. 380, 386, 122 N. E. 378:

> "* * * A constructive trust is the formula through which the conscience of equity finds expression. * * *" (P. 380.)

A constructive trust does not come into existence until it has been claimed and a decree of a court of general equity jurisdiction has impressed it upon certain property.

Stoehr vs. Miller, 296 Fed. 414-417 (C. C. A. 2nd, 1923);
Bogert, Trusts and Trustees, page 1456, Section 472;
40 Ohio Jurisprudence, Title "Trusts," Section 76, page 240;
Restatement of the Law of Restitution, Section 160a, page 641.

When the Supreme Court held in this case, as it did by its judgment, although not by its opinion, that it was petitioner's duty in support of her exceptions to the executor's inventory in the former proceeding to assert in addition to her legal title, not only that she held equitable title by virtue of an express trust, but also to claim that if it should be determined that she held neither legal nor equitable title that the Probate Court should nevertheless sustain her exceptions to the inventory by impressing (and thus for the first time creating), a constructive trust upon the property, the Supreme Court clearly retroactively imposed a duty upon petitioner which was non-existent at the time her exceptions were filed and heard in the Probate Court. This is clearly shown by the decisions in Sections (1) to (5) preceding.

The executor clearly could not be relieved from the mandatory duty imposed upon it by Section 10509-41, Ohio General Code (Appendix, page 52), to inventory the goods and chattels of the deceased "by law to be administered" merely because petitioner asserted the existence of facts which might or might not result in the impressing of a constructive trust upon the property. For aught an executor knows, under such circumstances,

at the time its duty to file its inventory arises, such claim may never be asserted in court. The executor itself is not a court, and it could not in this case by any action on its part have given rise to a constructive trust or *absolved itself from the duty of inventorying the property as assets of the estate because of petitioner's claim.* It seems clear, therefore, that under the law as it stood prior to the judgment of the Supreme Court herein, exceptions to the executor's performing its duty in inventorying the property could not "properly" bring before the Probate Court the subject matter of the claimed constructive trust. Such a claim would not have been material in determining whether the executor had properly inventoried the property because, whether or not the facts were found to be such as would justify a court of general equity jurisdiction in impressing a constructive trust, in either event, the holding on exceptions would have necessarily been (a) that the executor had properly inventoried the property, (b) that the exceptions were not well taken, and (c) that as the claim of constructive trust had no bearing upon the propriety of the inventory as filed such claim was not properly before the court and must be dismissed for want of jurisdiction. This was plainly the effect of the statutory law and decisions of the courts of Ohio prior to the present decision.

Under the judgment (as distinguished from the opinion of the Supreme Court in the case at bar), all of this former law is disregarded, retroactively as to petitioner, and this, we submit, amounts to a denial of due process under the Fourteenth Amendment.

B. Petitioner Has Been Denied Any Opportunity for Hearing on the Merits of Her Claims by the Decision Herein That She Should Have Submitted Her Equitable Rights to the Probate Court in the Former Proceedings, As That Decision Came at a Time When It Was Too Late for Her to Proceed in That Manner.

The discovery by the Supreme Court of Ohio that the Probate Court has jurisdiction to hear and determine, not only questions with respect to the rights and liabilities of trustees and beneficiaries of express trusts, but also to impress constructive trusts upon property upon exceptions to an inventory (which, as we have shown, is the effect of its *judgment*), comes too late to permit the petitioner to act in pursuance of it. She was necessarily guided by the decisions in effect when her exceptions were filed and heard, which showed that the Probate Court lacked any such jurisdiction. In fact, her original exceptions as filed in the Probate Court (R. 412) were amended in the Court of Common Pleas (R. 360) in a manner which made it certain, if she prevailed, that it could not be successfully claimed that she had prevailed by reason of the enforcement of equitable rights not within the jurisdiction of the Probate Court.

The time for filing exceptions had long gone by, and the proceedings on the exceptions filed had long been terminated by final judgment of the Supreme Court of Ohio against petitioner thereon, when the opinion herein was filed, and as hereinbefore shown, that court denied to petitioner any opportunity to present her equitable claims by amendment of her exceptions after its adverse decision, by refusing to remand the case for further proceedings.

We submit it is clear beyond dispute by the discussion under the foregoing sub-headings (1) to (6), that the present decision of the Supreme Court of Ohio has deprived petitioner of the right to a hearing on the merits of her equitable claims by retroactively (as to her) enlarging the jurisdiction of the Probate Court, and imposing on her retroactively the duty theretofore non-existent of submitting purely equitable rights, constituting a chancery case, to that court on a "special proceeding."

C. The Rules As to What Constitutes RES JUDICATA Have Been Retroactively Changed as to Petitioner by the Present Decision, in a Manner Which Imposes on Her a Duty to Have Asserted Her Equitable Rights in the Probate Court, Although No Such Duty Existed Under the Law of Ohio, When Her Exceptions Were Filed and Heard, Bars Her From Any Consideration of the Merits of Her Claims, Because She Did Not Do So and Thereby Deprives Her of Any Opportunity for a Hearing on the Merits.

(1) Prior to the Decision Herein It Was the Law of Ohio That a Party Litigant in That State Had the Right in One Action to Assert Full Legal Title to Property, and, Failing on That Claim, Then to Assert Any Equitable Title or Right in a Separate Suit, and That the Judgment in Such First Case Would Not Be RES JUDICATA in Such Second Case.

The claim or demand which petitioner mistakenly attempted to maintain in support of her exceptions in the former case was that she *had* become the owner of the

full legal title to the securities during the lifetime of her husband as the result of a gift *inter vivos* of the legal title from him, and that the executor, hence, had *no* right, title or claim of any kind to the securities, and that, accordingly, the executor was not properly performing its duty when it included the securities in its inventory and should be required to turn them over to her as her property.

Bolles vs. Toledo Trust Company, 132 O. S. 21, 4 N. E. 2d 917.

In the case at bar her claim or demand in her first cause of action (R. 2) is based upon the proposition that she had *not* become the owner of the legal title during her husband's lifetime; that he remained the owner of such title subject to an express trust in her favor; that the legal title, subject to the trust and to the duty of distributing to her, as beneficiary of the trust, passed to the executor upon Bolles' death, and that *it was the duty* of the executor to include the securities in his inventory as a part of the goods of Bolles to be administered by the executor. In her second cause of action (R. 8) in the case at bar her claim or demand was similarly based upon the proposition that she had *not* become the owner of the legal title during George A. Bolles' lifetime; that he remained the owner of such title; that he had intended to give her the equitable title, by the creation of an express trust, and that if he had failed to accomplish his purpose the circumstances were such as that a constructive trust should be impressed upon the property for her benefit and that all of Bolles' title, subject to her right to have a constructive trust impressed upon the property, had passed to the executor upon Bolles' death, and that *it was*

the duty of the executor to include the securities in its inventory as a part of the goods of Bolles to be administered by it.

Under the law as settled for many years in Ohio, prior to the decision in the present case, petitioner's claims in her present action constituted causes of action separate and distinct from the claim asserted by her in support of her exceptions, that she had the full legal title to the property, and would *not* have been barred by the decision that she did not have such legal title.

In *Miller vs. Brown*, 33 O. S. 547 (1878), it appeared that in a prior action between the same parties it had been determined that Brown was entitled to a deed evidencing full legal title to 11 inches only out of a certain 15-inch strip of real estate. In a subsequent action in equity between the same parties, Brown asserted an easement to use the entire 15 inches as foundation for a wall, and claimed damages from Miller because Miller had cut away the foundation on the four inches as to which Brown's legal title had been denied in the former case. Miller claimed the former judgment was *res judicata*, but the Supreme Court of Ohio held against him, saying in part:

> "The sole purport of that decree was that Brown was entitled to a deed for eleven inches and not fifteen. Nothing else was determined. No other rights were in issue. The court did not attempt to settle what rights Brown had in the four inches beyond the eleven. They said he was not entitled to a deed for those four inches, but they did not say he had no interest therein whatever. They did not say that circumstances could not create an easement therein. The decree only settled the rights between the parties as to what por-

> tion of the land specified in the contract Brown was entitled to have conveyed to him by Miller." (P. 554.)

So in petitioner's former proceeding on exceptions to the inventory it was settled only that petitioner had not been vested with full legal title to the property by her husband during his lifetime. The court found she had not so received full legal title but, "they did not say (s)he had no interest therein whatever." Neither did they say that "circumstances could not create" a trust therein. We submit the case presents an exact parallel to petitioner's present and former suit.

In *Gibson vs. McNeely*, 11 O. S. 131 (1860), the court said:

> "* * * The subject matter brought directly in issue in the two cases is not the same. In the former suit the plaintiffs sought to enforce certain alleged trusts, in which they claimed to be beneficially interested, under the will of Samuel Stitt. But, in this action, they set up a legal title, and claim to recover the possession of real estate, and their right to such recovery may not depend wholly on the questions adjudicated in the former suit." (Pp. 133, 134.)

The present petitioner in her former proceeding sought to enforce a legal title and in these proceedings she seeks to enforce certain trusts, and her right to recovery manifestly does not depend at all upon the questions adjudicated in the former case inasmuch as she necessarily accepts as the foundation of her present claim of equitable right and title the decision in the former case that legal title is in the respondent-executor.

In *Cleveland Trust Co. vs. White,* 134 O. S. 1-8 (1938), the court said:

> "It is often remarked that a gift *inter vivos* and a voluntary trust are very nearly identical. This is not strictly true. A gift *inter vivos* bestows on the beneficiary both the legal and equitable title, while a trust conveys the equitable title only, the legal title resting in a trustee. 20 Ohio Jurisprudence 13, Section 10." (P. 8.)

In *Jones vs. Kilbreth,* 49 O. S. 401 (1892), the question was whether a prior judgment at law barred the establishment of a trust in equity claimed to have attached to the proceeds of a draft. The Supreme Court said:

> "* * * It is claimed that a trust attached to the proceeds of the Dows & Co. draft, which were wrongfully placed in the trust estate, and which cannot be reached without the interposition of a court of equity. In seeking equitable relief in such case, we do not think that the plaintiffs in error are estopped by the judgment rendered in favor of Samuel Fosdick in the Superior Court. * * *" (P. 414.)

Compare,

Northern Assurance Company of London vs. Grand View Bldg. Ass'n, 203 U. S. 106 (1906), (opinion by Mr. Justice Holmes).

Prior to the decision herein it was the unquestionable law of Ohio settled by decisions of the Supreme Court of that state, that a former adjudication upon a *different claim* or *demand* is not a bar or an estoppel as between the same parties, except as to issues which were actually and necessarily decided in the former case.

Lessee of Lore vs. Truman, 10 O. S. 45 (1859);
Porter vs. Wagner, 36 O. S. 471 (1881);
Railroad Company vs. Ralston, 41 O. S. 573 (1885);
Jones vs. Kilbreth, 49 O. S. 401 (1892);
**Hixson vs. Ogg,* 53 O. S. 361 (1895);
Sauer vs. Downing, 109 O. S. 120 (1923);
Gibson vs. Solomon, 136 O. S. 101-103 (1939).

In the case at bar the Court of Appeals recognized and applied the rule that the decision of a legal cause of action is not a bar to equitable rights. That court said in part, speaking of the decision by the Supreme Court in the former case:

> "The Supreme Court decided only the law questions before it. The door was not closed by it, but very definitely left open for such other remedies as the widow might have to secure what her husband intended to be hers, and this court is unable to see in what respect the former decision, on a strict question of law, is a bar to the present question of manifest equity." (R. 487.)

The Supreme Court has now stated the law and made it retroactive as to petitioner that, "the general rule is that a former adjudication settles all issues between the parties that could have been raised and decided as well as those that were decided." The court thus ignored the qualification theretofore in effect in Ohio that the statement quoted is true only as to issues

* Citing and following Mr. Justice Field's opinion in *Cromwell vs. County of Sac,* 94 *U. S.* 351 (1876).

"respecting the *same* claim or demand which was in issue in the former case."

The effect of the court's decision is that there was retroactively imposed upon petitioner the duty to set up in support of her exceptions separate, distinct and inconsistent claims or causes of action, although the law at the time she filed her exceptions was that she was under no duty so to do, but might try out her separate claims at law and in equity by separate proceedings. The result of this change in the law is to deprive plaintiff of any right or opportunity to have her equitable rights passed upon at all.

As hereinbefore shown, plaintiff could not under the law as it stood have had her equitable rights passed upon by the Probate Court on her exceptions to the inventory. Thus the court's holding that it was her *duty* to present her equitable rights on exceptions to the inventory means that it was her duty to do what would have been a futile thing if she had done it, and it now holds that because she did not do this futile thing she has lost all her equitable rights to the property in question.

However, even if she had had a *right* to present her equitable claims to the Probate Court and have them there passed upon in support of her exceptions, since, as we have shown, the law of Ohio was that legal and equitable rights are separate causes of action and may be separately asserted without defeat in one barring the other, it was not her *duty* to assert both rights therein, and it follows that to change that rule retroactively by imposing such duty upon her at a time when her opportunity to assert both rights in the former proceedings is gone, is enough in and of itself to offend against the con-

stitutional requirement of due process under the Fourteenth Amendment.

(2) Prior to the Decision Herein It Was the Law of Ohio that a Party, Being in Doubt as to Which of Several Rights or Remedies He Had, Might Test His Rights in Successive Suits Without Being Barred From Obtaining a Remedy He Actually Had, by First Trying to Enforce a Right or Remedy Which He Had Not.

When the executor filed its inventory and included in it the property here in controversy, petitioner was placed in position where she had to determine what proceedings should be taken to protect her rights. As the law of Ohio then stood, she was entitled to take her choice of the possible rights and remedies either at law or in equity, and if her choice proved to be wrong, then to claim the other right and pursue the other remedy without being barred by the adverse result as to right first asserted and the remedy first sought. The Supreme Court of Ohio in *Conrad vs. Coal Company*, 107 O. S. 387 (1923) recognized and applied the rule which it quoted in the following language from Ruling Case Law:

> "'It is a well-established rule that the choice of a fancied remedy that never existed, and the futile pursuit of it, either because the facts turn out to be different from what the plaintiff supposed them to be, or the law applicable to the facts is found to be other than supposed, though the first action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy.' 9 Ruling Case Law, 962, Section 9." (Pp. 393-4.)

Again, in *Industrial Commission of Ohio vs. Broskey,* 128 O. S. 372 (1934), the court approved the following statement from its decision in the *Conrad case, supra*:

> " 'The fact that a party through mistake attempts to exercise a right to which he is not entitled or has made choice of a supposed remedy which never existed, and pursued it until the court adjudged that it never existed, does not preclude him from afterwards pursuing a remedy for relief, to which in law and good conscience he is entitled.' " (P. 383.)

In the light of these decisions petitioner was entitled to assert her legal title by use of the remedy of exceptions to the executor's inventory, in full confidence that if she were defeated in that claim, "either because the facts turned out to be different from what the plaintiff supposed them to be or the law applicable to the facts is found to be other than supposed" that she might then proceed to enforce her equitable rights wholly unembarrassed by the result in the first proceeding.

The Court of Appeals herein recognized and applied this rule. It quoted with approval the following from *Harrill vs. Davis,* 168 Fed. 187 (1909):

> "The fatuous choice of a fancied remedy that never existed, and the futile pursuit of it until the court adjudges that it never had existence, is no defense to an action to enforce an actual remedy inconsistent with that first invoked," (Syl. 8.)

and cited a number of other authorities, including *Becker vs. Walworth,* 45 O. S. 169 (1887), to the same effect.

The Supreme Court of Ohio wholly ignored the decisions just quoted and has now held retroactively as to

petitioner that she acted at her peril in first attempting to assert her legal rights by the remedy of exceptions, and then to assert her equitable rights by a suit in equity, and that having made the wrong choice of proceeding at law she is wholly barred from relief in equity. This change of the rules in the middle of the litigation, we submit, is a denial of due process under the Fourteenth Amendment.

We are not seeking this review of the decision below merely because it is erroneous, *Central Land Company vs. Laidley*, 159 U. S. 103 (1895), or because it is a reversal of previous decisions on a question of general law, *Patterson vs. Colorado, ex rel. Attorney General*, 205 U. S. 454 (1907), but because in the respects hereinbefore pointed out it changed the law of the state in a way which as to *petitioner*, enlarged *retroactively* the jurisdiction of the Probate Court and imposed on petitioner *retroactively* duties to proceed therein which were nonexistent at the time when it is held she should have so proceeded, with the result that she is, as hereinbefore pointed out, deprived of any hearing on the merits of her claims because she did not perform such then nonexistent duties.

3. The Raising of the Federal Question on Application for Rehearing Was Timely as the Constitutional Questions Did Not Arise Until the Decision of That Court.

It seems to us that the decision of this court in *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer*, 281 U. S. 673 is decisive upon this point. We think, also, the opinion of this court and the dissenting

opinion by Mr. Justice Cardozo in *Herndon vs. Georgia*, 295 U. S. 441, establish that the constitutional questions were here properly raised by the application for rehearing. In this case, unlike the situation in the *Herndon case*, there was no intervening decision by the state Supreme Court placing petitioner upon notice that the prior rulings of the court were to be abandoned and reversed in this case.

In both lower courts it was held that the decision in petitioner's former proceedings were not *res judicata*. The Court of Appeals held that the former case, being one at law, and the present, in equity, the decision against petitioner's claim of legal title presented no bar to the assertion of her equitable rights. There was, therefore, no occasion for petitioner to raise or argue any question under the Federal Constitution, for there was none in the case until the Supreme Court rendered its decision retroactively enlarging the jurisdiction of the Probate Court and retroactively imposing upon petitioner new duties and burdens and thus deprived her of any right to a hearing on the merits of her equitable claims as hereinbefore set forth. As stated by Mr. Justice Cardozo in the dissenting opinion in *Herndon vs. Georgia*, 295 U. S. 441, pages 452 and 453, petitioner,

> "* * * might wait until the law of the case had been rejected by the reviewing court before insisting that the effect would be an invasion of his constitutional immunities. If invasion should occur, a motion for rehearing diligently pressed thereafter would be seasonable notice. This is the doctrine of *Missouri vs. Gehner* and *Brinkerhoff-Faris Co. vs. Hill*. It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of procedural entanglements." (Pp. 452, 453.)

CONCLUSION

We respectfully submit that this case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Supreme Court of Ohio herein pointed out may be cured and that petitioner's fundamental constitutional right, safeguarded by the Fourteenth Amendment, to a hearing on the merits of her claims may be protected and enforced.

Respectfully submitted,

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APPENDIX

THE CONSTITUTION OF THE STATE OF OHIO

Article IV, §4. (Jurisdiction of Courts of Common Pleas):

> "The jurisdiction of the courts of common pleas, and of the judges thereof, shall be fixed by law."

Article IV, §6. (Jurisdiction of Courts of Appeals):

> "* * * The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction, and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court. * * *" (Adopted Sept. 3, 1912.)

Article IV, §8. (Jurisdiction of Probate Courts):

> "The probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, and such jurisdiction in habeas corpus, the issuing of marriage licenses, and for the sale of land by executors, administrators and guardians, and such other jurisdiction, in any county, or counties, as may be provided by law."

OHIO STATUTES

Ohio General Code, Section 10501-53:

§10501-53. Jurisdiction of the probate court.

§10501-53. Except as hereinafter provided, the probate court shall have jurisdiction:

1. To take proof of wills, and to admit to record authenticated copies of wills executed, proved and allowed in the courts of any other state, territory or country. In case of the sickness or unavoidable absence of the probate judge, any common pleas judge may take proof of wills and approve bonds to be given, but the record of such acts must be preserved in the usual records of the probate court;

2. To grant and revoke letters testamentary and of administration;

3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates;

4. To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;

5. To grant marriage licenses, and licenses to ministers of the gospel to solemnize marriages;

6. To make inquests respecting lunatics, insane persons, idiots and deaf and dumb persons, subject by law to guardianship;

7. To qualify assignees and appoint and qualify trustees and commissioners of insolvent debtors, control their conduct and settle their accounts;

8. To authorize the sale of lands or equitable estates or interests therein, on petition by executors, administrators and guardians, and the assignments of inchoate dower in such cases of sale;

9. To authorize the completion of real contracts on petition of executors and administrators;

10. To allow and issue writs of habeas corpus, and determine the validity of the caption and detention of the persons brought before it on such writs;

11. To construe wills;
12. To render declaratory judgments;
13. To direct and control the conduct of fiduciaries and settle their accounts.

Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law.

The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute. (114 v. 335. Eff. Jan. 1, 1932.)

Ohio General Code, Section 10504-71:

§10504-71. Property acquired subsequently.

§10504-71. Any estate, right or interest in lands or personal estate or other property of which the decedent was possessed at his decease shall pass under the will unless the will manifests a different intention. (114 v. 359. Eff. Jan. 1, 1932.)

Ohio General Code, Section 10506-67:

§10506-67. Proceeding when assets concealed or embezzled.

§10506-67. Upon complaint made to the probate court or common pleas court of any county by a fiduciary, creditor, devisee, legatee, heir or other person interested in the trust estate, or by the creditor of any devisee, legatee, heir, or other person interested in the trust estate, against the fiduciary or any other persons suspected of having concealed, embezzled or conveyed away or of being or having been in the possession of any moneys, goods, chattels, things in action, or effects of such estate, said court shall cite the person so suspected forthwith to appear before it to be examined, on oath, touching the matter of the complaint. The probate court shall also have power to initiate proceedings on its own motion. (114 v. 379. Eff. Jan. 1, 1932.)

Ohio General Code, Section 10509-41:

§10509-41. Inventory.

§10509-41. Within one month after the date of his appointment, unless the court grants an extension of time for good cause shown, every executor or administrator or administrator de bonis non shall make and return upon oath into court, a true inventory of the real estate of the deceased, and of the goods, chattels, moneys, rights and credits of the deceased, by law to be administered, and which have come to his possession or knowledge; except that if the probable value of the personal property be less than five hundred dollars, the court may direct that such inventory be omitted. If his predecessors have so done, an administrator de bonis non shall not be required to return and file an inventory, unless, in the opinion of the probate court, it is necessary. (114 v. 411. Eff. Jan. 1, 1932.)

Ohio General Code, Section 10509-41, as amended September 2, 1935, 116 Laws of Ohio, page 394:

§10509-41. Inventory; separate schedule.

§10509-41. Within one month after the date of his appointment, unless the court grants an extension of time for good cause shown, every executor or administrator * * * shall make and return * * * *on* oath into court, a true inventory of the real estate of the deceased *located in Ohio*, and of the goods, chattels, moneys, rights and credits of the deceased, by law to be administered, and which have come to his possession or knowledge, *based on values as of the date of death of the decedent;* except that if *the decedent left no surviving spouse or minor child or children, and* the probable value of the personal property be less than five hundred dollars *or the personal property consists wholly of stocks, bonds, moneys, deposits or other securities,* the court may direct that * * * *an* inventory *and appraisement* be omitted *and an inventory*

without appraisement be filed in lieu thereof. If his predecessors have so done, * * * *a fiduciary* shall not be required to return and file an inventory, unless, in the opinion of the probate court, it is necessary.

*At the time of filing the inventory, the executor or administrator shall file therewith a separate schedule describing any legal or equitable interest in the real estate owned by the decedent located outside of the state of Ohio which has come to his knowledge.**

Ohio General Code, Section 10509-51:

§10509-51. Bonds and other securities.

§10509-51. The inventory shall contain a particular statement of all bonds, mortgages, notes, and other securities for the payment of money, belonging to the deceased, known to such executor or administrator, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, with their dates, the serial numbers or other identifying data as to each bond, stock certificate, certificate of deposit, or other security, and the sum which, in the judgment of the appraisers, can be collected on each claim. (114 v. 413. Eff. Jan. 1, 1932.)

Ohio General Code, Section 10509-52:

§10509-52. Accounts and debts receivable.

§10509-52. The inventory also must contain a statement of all debts and accounts belonging to the deceased, known to such executor or administrator, specifying the name of the debtor, the date, the balance or thing due, and the value or sum which can be collected thereon, in the judgment of the appraisers. (114 v. 413. Eff. Jan 1, 1932.)

*(Asterisks in above section denote deletion from former code and italics denote additions.)

Ohio General Code, Section 10509-59:

§10509-59. Exceptions and hearing.

Upon the filing of the inventory the court shall forthwith set a day not later than one month after the day such inventory was filed, for hearing on the inventory, and shall give at least ten days' notice by registered mail or otherwise of the hearing to the executor or administrator and to such of the following as are known to be residents of the state and whose place of residence is known; surviving spouse, if any; next of kin; beneficiaries under the will, if any; the attorney or attorneys, if known, representing any of the aforementioned persons. Such notice may be waived in writing by any of the foregoing. For good cause the hearing may be continued for such time as the court deems reasonable. Exceptions to the inventory and/or year's allowance may be filed at any time prior to five days before the date set for the hearing or the date to which such hearing has been continued as provided herein, by any person interested in the estate or in any of the property included in the inventory, but such time limit for the filing of exceptions shall not apply in case of fraud or concealement of assets. At the hearing the executor or administrator, and any witness may be examined under oath. The court must enter its finding on the journal and tax the costs as may be equitable. (114 v. 415. Eff. Jan. 1, 1932.)

Ohio General Code, Section 11215:

§11215. Jurisdiction in civil cases.—The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace; and appellate jurisdiction from the decision of county commissioners, justices of the peace, and other inferior courts in the proper county, in all civil cases, subject to the regulations provided by law. (R. S. §456.)

Ohio General Code, Section 11238:

§11238. Form of action.—There shall be but one form of action, to be known as a civil action. This requirement does not affect any substantive right or liability, legal or equitable. (R. S. §4971; 37 O. S. 387; 15 O. S. 412.)

IN THE

Supreme Court of the United States

October Term, 1940

No. 270

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF THE WILL OF GEORGE A. BOLLES, DECEASED,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The principal contentions made by respondent, summarized, are:

1. That the petitioner was too late in raising the federal constitutional question.

2. That the question here involved is merely one of state procedure which does not raise a federal question, and was rightly decided anyway.

Reply to Respondent's Contention That the Constitutional Question Was Raised Too Late

Respondent claims it was the duty of petitioner to assert in one of several suggested ways, in the *trial* court, that if the court should sustain respondent's claim of *res judicata*, that such decision would be an unconstitutional act of the state in violation of petitioner's right under the Fourteenth Amendment. This, we submit, is plainly wrong.

It was petitioner's contention that under the then existing and established law of Ohio respondent's claim of *res judicata* on its merits was unfounded. Manifestly if the trial courts should hold, as in fact both lower courts did hold, that petitioner was right in this position, then no constitutional question could be raised in that court. The act of *respondent* in asserting the claim of *res judicata* was not an infringement of petitioner's constitutional rights. The Fourteenth Amendment protects against action by the *state*. The mere assertion of a defense by an individual presents no constitutional question. The rule as to state action is the same whether the state acts unconstitutional by legislative or by judicial action. The mere passage of an unconstitutional statute does not give an individual the right to complain of it until the state acts to enforce it to his injury.

Ohio Power & Light Co. vs. Pfost, 286 U. S. 165, 186;

Dahnke-Walker Milling Co. vs. Bondurant, 257 U. S. 282, 289;

Jeffrey Mfg. Co. vs. Blagg, 235 U. S. 571, 576;

Yazoo & Mississippi Valley Railroad Co. vs. Jackson Vinegar Co., 226 U. S. 217.

So the mere assertion by the respondent of the defense of *res judicata* and the denial of its validity by the lower courts, did not either require or entitle petitioner to assert any rights under the Federal Constitution or constitute any infringement of her constitutional rights by the state. It was only when the state, through its Supreme Court, departed from the established law and sustained the defense of *res judicata,* that petitioner was threatened with injury requiring and entitling her to assert her rights under the Federal Constitution.

The situation is similar to that in the case of *Grannis vs. Ordean,* 234 U. S. 385, where this court speaking by Mr. Justice Pitney said:

> "There is a motion to dismiss, upon the ground that the federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the state, the federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in the partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court upholding the notice that first ran counter to the alleged federal right. * * *" (Page 392.)

As both lower courts held against the defense of *res judicata* upon its merits, it follows that under the familiar rule that courts will not decide constitutional questions where they are not necessarily involved in the pending litigation, neither lower court would or could properly have decided the constitutional question now raised by petitioner. Petitioner could not in fact have raised the constitutional question before she did except

hypothetically, that is, by saying that if the court should sustain the defense of *res judicata* that then the state, through its court, would be acting unconstitutionally, and as the lower courts held against the defense of *res judicata* on its merits, they could not have decided the constitutional question except hypothetically. Hypothetical constitutional questions have no place in court procedure.

It was the law of Ohio, established by many decisions, as shown in petitioner's brief herein, that the decision in the former case was not *res judicata,* both because of lack of jurisdiction of the Probate Court over the issues in the present case, and for the reason that the causes of action in the Probate Court and in the present case were entirely different. The law of Ohio in this respect was recognized and followed by both lower courts and became the law of the case, subject to review by the Supreme Court. When the Supreme Court handed down its opinion sustaining the defense of *res judicata,* the state, for the first time, acted in violation of petitioner's constitutional right under the Fourteenth Amendment to due process of law. At that point, and prior to the issuance of a mandate by the Supreme Court, petitioner was first called upon to and did assert that carrying said decision into effect would be in violation of her right to due process.

The cases cited by respondent at pages 17 and 18 of its brief in support of the statement that this court will not consider claims first made in an application for rehearing (except *Herndon vs. Georgia,* which sustains our position) are not in point. None of them (with that exception) involves a situation such as that in the case at bar where the complaint is of unconstitutional action by

the state resulting from a decision of the Supreme Court, retroactively changing the law so as to deprive a party of all opportunity for a hearing upon the merits of his cause of action. The controlling cases are those cited in our brief, *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer,* 281 U. S. 673, and *Herndon vs. Georgia,* 295 U. S. 441. We note that no effort is made in the brief for respondent to distinguish the reasoning either of the majority opinion or of the dissenting opinion in *Herndon vs. Georgia.* The attempted distinction of *Brinkerhoff-Faris Trust & Savings Company vs. Hill, Treasurer,* entirely misses the point of that case. Respondent attempts to establish that the decision in that case depended upon the fact, incidentally mentioned by the court, that the possibility of relief before the Tax Commission was not suggested until the Supreme Court filed its opinion. This point was not made by this court in connection with the question of the timeliness of raising of the constitutional question. It was made in connection with the ruling by this court that the decision of the State Supreme Court came at a time when it was too late for plaintiff to proceed before the Tax Commission, and, hence, denied plaintiff due process of law. The court said that the federal claim made by application for rehearing after the decision of the Supreme Court "was timely since it was raised at the first opportunity" and cited the decision of this court in *Missouri vs. Gehner,* 281 U. S. 313. In that case this court said, page 320:

> "* * * It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. * * *"

This court pointed out that the Board of Equalization had completely eliminated the bonds from its calculations, and, hence, that the company "could not earlier have assailed this action as violative of the constitution and laws of the United States." Just so here the lower courts completely eliminated the defense of *res judicata* and petitioner could not have assailed any action of the court as violative of the constitution of the United States as no such action was taken until the Supreme Court handed down its opinion.

In *Saunders vs. Shaw, et al.*, 244 U. S. 317, this court held that a question under the federal constitution raised for the first time by an assignment of error in the State Supreme Court designed to bring the case to this court, was raised in time. In that case the State Supreme Court had entered final judgment based on evidence which had been offered and ruled out, but nevertheless placed in the record by the plaintiff, which the defendant had not attempted to meet. This court, speaking by Mr. Justice Holmes, said, in part:

> "* * * The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a

> ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation. *Home Telephone & Telegraph Co. vs. Los Angeles,* 227 U. S. 278. It appears that shortly after the Supreme Court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the Chief Justice of the state by his assignment of errors. We do not see what more he could have done." (P. 320.)

We think the situation here is analogous to that in the *Saunders case.* The reversal and entry of final judgment in the former *Bolles case* was, as shown in our first brief herein, pages 26 and 27, equivalent under the rule of *Bank vs. Shadyside Coal Co.,* 121 O. S. 544, to a determination by the Supreme Court of Ohio that petitioner's exceptions in the Probate Court could not be supported by a claim of equitable title and hence that a remand to permit a new trial would be useless. Petitioner had no reason to anticipate that the courts in the present case would take a position contrary to that thus taken in the former case and contrary as well to many other decisions of the state courts of Ohio, and hence in the language of Mr. Justice Holmes, "was not bound to ask a ruling or to take other precautions in advance" of the decision by the Supreme Court of Ohio to the effect that she could and should have pleaded and proved her equitable rights and title in the proceeding in Probate Court. We respectfully submit that the raising of the constitutional question on application for rehearing was timely under the decisions of this court.

Reply to Respondent's Contention That a Mere Matter of State Procedure Is Here Involved, and Was Correctly Decided Anyway.

We do not dispute the power and right of the Supreme Court of Ohio to interpret the statutes of Ohio and to establish the law of that state in general, but we do contend that in so doing the Supreme Court of Ohio, like any other instrumentality of the state, may not deprive a person of due process of law without violating such person's rights under the Fourteenth Amendment and giving rise to a question properly subject to review by the Supreme Court of the United States.

In the case at bar, we believe it is established in our former brief that the result of the decision of the Supreme Court of Ohio has been to deprive petitioner of any opportunity for a hearing on the merits of her equitable claims. This result has been reached by a decision retroactively conferring full equitable jurisdiction upon the Probate Court of Ohio contrary to the established law of Ohio in effect when petitioner still had an opportunity to proceed in that court. Such a decision does not involve a mere matter of state procedure, but involves a matter of federal constitutional right. In connection with its argument on this point respondent seeks to convince this court that the change in the law of Ohio was brought about not by the decision of the Supreme Court herein, but by the passage of the new Probate Code of Ohio which took effect on January 1, 1932. In this connection they say at page 22:

> "In asking this court to review the present case opposing counsel are in reality asking this court to interpret an Ohio statute and to define the jurisdiction of a probate court upon exceptions to an inventory."

This is a misleading statement. What we are asking this court to decide is that up to the time of the decision by the Supreme Court of Ohio in the present case, it was the settled law of Ohio (both before and after the adoption of the Probate Code) that Probate Courts did not have jurisdiction to hear and determine either (a) questions of express trust, or (b) questions of constructive trust, with respect to property being administered by officers of such courts, and that the decision in the present case retroactively conferring such jurisdiction on the Probate Court and barring petitioner from any determination on the merits of her claims of express and constructive trust because she did not present them to the Probate Court, deprives her of due process of law in violation of the Fourteenth Amendment. The jurisdiction of the Probate Courts in Ohio hereafter will be what the Supreme Court of Ohio says it shall be, in the absence of further legislation, notwithstanding any decision which may be rendered herein by this court. But if this court sustains petitioner's contentions she will have her claims of express and constructive trust heard and determined on their merits notwithstanding the change in the jurisdiction of the Probate Court effected by the decision of the Supreme Court of Ohio herein. Such change will be effective from and after the date of the decision of the State Supreme Court, but will not be effective to bar petitioner's rights herein.

In short, while we recognize the power of the Supreme Court of Ohio to interpret the Probate Code of Ohio and to enlarge the jurisdiction of the Probate Court to whatever extent the Supreme Court may deem proper, we deny the power of the Supreme Court to enlarge the

jurisdiction of the Probate Court retroactively so as to deprive petitioner of her constitutional right to a hearing.

That never until the decision in the present case had it been held that the Probate Court had jurisdiction to determine questions of express trust and of constructive trust, we submit, is made clear by our former brief. We note that no effort is made in respondent's brief to meet the contentions therein contained to the effect that proceedings on exceptions to an inventory in the Probate Court are special statutory proceedings and cannot be appealed for trial *de novo* to the Court of Appeals. *In re Estate of Gurnea,* 111 O. S. 715. Whereas, suits to establish express or constructive trusts are equity or chancery cases and are appealable of right for trial *de novo* in the Court of Appeals. See cases cited pages 11 to 14 of our former brief.

Since proceedings on exceptions to an inventory and suits to establish express or constructive trusts are so entirely different in their nature, and since the Court of Appeals has full jurisdiction on trial *de novo* as to such trust suits and has no such jurisdiction on exceptions to an inventory, it necessarily follows that under the law as it stood prior to the present decision petitioner could not have had her claims of express and constructive trust heard and determined on exceptions to the inventory. The Supreme Court of Ohio did not attempt to reconcile its decision herein with its decision in *In re Gurnea,* 111 O. S. 715, and respondent has made no attempt to do so either. We think it is obvious that the decisions are irreconcilable.

On pages 18 and 19 of its brief, respondent says:

> "With the exception of the case of *Juhascz vs. Juhascz* (1938), 134 O. S. 257, 16 N. E. (2d) 328,

> opposing counsel have cited *no* Supreme Court case and *no* lower court case on the jurisdiction of the Probate Court upon exceptions to an inventory under the new code. * * *" (Italics are respondent's.)

We have, however, cited a number of cases dealing with the broader question which is here involved, which is whether the Probate Court under *any kind of* proceeding, has the broad powers of a court of equity which are necessary in dealing with express trusts, and, particularly, in impressing constructive trusts upon property. We have shown that in *State ex rel. Black, Executor, vs. White, Judge,* 132 O. S. 58 (1936), decided four years after the adoption of the new Probate Code, the Supreme Court held:

> "* * * The Probate Court is a court of limited jurisdiction, having only such power as is conferred upon it by the constitution and statutes of Ohio, and *has not the inherent general jurisdiction of common law and chancery courts.* * * *" (P. 66.) (Italics ours.)

We have shown that in that case the court reaffirmed its holding in *Gilliland vs. Sellers,* 2 O. S. 223 (1853), that

> " 'The decree of a probate court in Ohio, involving the exercise of the general jurisdiction of a court of equity, must be considered as *coram non judice* and void.' " (132 O. S. 66.)

We have shown that in *Goodrich, Admr., vs. Anderson,* 136 O. S. 509, decided by the Supreme Court of Ohio the same day as the case at bar, the court held:

> "* * * there is a limitation upon the 'plenary power' granted to Probate Court in the last paragraph of Section 10501-53, General Code, * * *" (P. 511.)

and that a special proceeding in that court

> "* * * may not be used primarily as a substitute for a civil action for a money judgment wherein pleadings are required properly to define the issues." (P. 512.)

and we have shown that there are other decisions by the Supreme Court and lower courts of Ohio to the same effect, see our brief, pages 15 to 19. Respondent entirely ignores these decisions and contents itself on this point with the citation of *Unger vs. Wolfe*, 134 O. S. 69, 15 N. E. (2d) 955 (1938), holding merely that (syllabus):

> "Under the provisions of Section 10501-53, General Code, the Court of Probate has exclusive jurisdiction as to the allowance of fees to an attorney for his services in the unsuccessful prosecution of an application for the removal of the guardian of an incompetent."

a decision which certainly does not support respondent's contention that the Probate Court is a court having full chancery jurisdiction.

We note that not only does respondent's brief fail to comment upon the cases cited in our brief showing the lack of chancery jurisdiction in Probate Court, but also completely fails to cite any case holding that the court has such chancery jurisdiction. Such failure is due to the fact that until the decision in the present case was rendered no such decision had ever been rendered in Ohio.

Capital is sought to be made by respondent of the fact that in petitioner's original exceptions in the Probate Court some language was used which might have been treated as an attempt to assert some equitable right. The final judgment in the former case, however, was upon amended exceptions which the Supreme Court held

presented only questions of legal title. Thus there was no attempt made to obtain and no adjudication obtained of any equitable rights in the former case.

It is stated on page 9 of respondent's brief that the former proceeding and the present suit are identical in five particulars, but this statement is incorrect, at least in so far as particulars numbered 3 and 4 are concerned. They are:

> "(3) The claim of property in the securities is the same, namely, the present complete legal and equitable title to all the securities;
> "(4) The relief demanded is the same, namely, the endorsement and surrender of possession of the securities and of all proceeds and dividends therefrom;".

The facts are that the claim of property in the securities asserted in the former suit by petitioner was that she was and had been during her deceased husband's lifetime the owner of full legal and equitable title to the securities by reason of a gift *inter vivos* from her husband. In the present case her contentions are two—in the alternative. First, that her husband owned the legal title to the securities which passed to the respondent as his executor, subject to an express trust in favor of petitioner established by her husband in his lifetime, under which she became entitled to receive the properties from his executor after his death. And second, that if her husband failed to complete the express trust in her favor, that the circumstances are such as that the executor should be regarded as holding the legal title subject to a constructive trust in her favor which should be impressed upon the property by a court of equity. It is

obvious, therefore, that respondent is wrong in the assertion that the *claim* of property is the same in both cases.

It is not true that the relief demanded in the two cases was the same, as in the present case petitioner prayed (R. 13, 14) that the court order the executor to,

> "* * * execute said trust under which said testator held and said executor now holds the personal property hereinbefore described and to transfer, turn over and deliver to the plaintiff each and all of said items of personal property and to do such other things as are necessary to enable the plaintiff to receive the benefits of said trust under which said testator held and said executor now holds said property, or, in the event said court refuses to grant plaintiff's above prayer, that the court find and order that The Toledo Trust Company, executor of the will of George A. Bolles, deceased, holds said property as the successor of said testator, upon a constructive trust for the sole and exclusive benefit of the plaintiff, Clara C. Bolles, and order that said executor execute said trust and transfer, turn over and deliver to the plaintiff, each and all of the items of personal property hereinbefore described and to do such other things as are necessary to enable the plaintiff to receive the benefits of the trust under which said testator held and executor now holds said property and for an order granting this plaintiff such other and further relief as the court deems just and equitable in the premises."

The prayer of her amended exceptions (R. 364) was:

> "Wherefore, said exceptor, Clara C. Bolles, prays that the court order and direct The Toledo Trust Company, executor of the will of George A. Bolles, deceased, to exclude from the inventory of the assets of the estate of said decedent the property hereinbefore described, to return to her each and all of the items of personal property herein-

> before described, and to do such things as are necessary to enable her to secure the transfer thereof upon the books and records of the respective corporations issuing said certificates and evidences of indebtedness, and for such other and further relief as the court deems just and equitable in the premises."

While it is of course true that the ultimate ends which petitioner sought to attain, first by her exceptions to the inventory and second by her present suit, were the establishment of rights in her behalf in the property, they were not the *same* rights. The rights which she sought to establish by the exceptions were *legal* rights not requiring the interposition of a court of equity, whereas the rights she sought to establish in the present suit were purely *equitable* rights such as could not be established otherwise than by decree of a court having full equity powers. In the former proceedings she asserted that the executor had *no* right, title or interest in the securities of any kind, whereas in the present case she asserts that the legal title to the property *is* in the executor and that only by relief in equity can her equitable rights therein be established. The long line of authorities cited at pages 37 to 42, inclusive, of our first brief herein, demonstrates that it was the law of Ohio until the decision in the present case that a decision against the existence of legal rights was not *res judicata* of equitable rights.

While we recognize that the question of what is *res judicata* is ordinarily a matter for decision by the state court, nevertheless we submit that its power in that respect has the same limitation as its power with respect to the interpretation of state statutes, that is, it cannot retroactively make that *res judicata* which was not *res*

judicata when the proceedings in question were had, if the effect of so doing is to deprive a party of all opportunity of a hearing on the merits of his claim.

We direct attention to the facts:

(a) That although respondent claims (brief page 25) that the Supreme Court of Ohio correctly applied the principles of *res judicata,* respondent makes no attempt to distinguish any of the cases cited by us at pages 39 to 42, inclusive, of our brief, which clearly show that under the law as it stood prior to the present decision, the decision on the Probate Court exceptions was not *res judicata,* and

(b) That the respondent makes no attempt to distinguish or explain why the decision of the court below was not contrary to the prior decisions of that court in *Conrad vs. Coal Company,* 107 O. S. 387 (1923), and *Industrial Commission of Ohio vs. Broskey,* 128 O. S. 372 (1934), holding that the choice of a wrong remedy does not bar the subsequent assertion of the proper remedy. The only attempt respondent makes to meet the rule of these cases is to cite the case of *American Surety Co. vs. Baldwin,* (1932) 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231, and to claim that the court ruled against the same argument in that case that we make in this case, *i.e.,* that the mistaken choice of a remedy which does not exist is not *res judicata* as to a remedy which does exist. That claim of respondent is contrary to the facts. The situation in the *American Surety Company case* was entirely different. There, as is shown by the quotation from the opinion set forth in respondent's brief, page 28, the surety company moved to vacate a state court judgment instead of taking an appeal from the judgment to the State Su-

preme Court. It lost on its appeal *not because the decision of the court below on the motion was res judicata, but because it took the appeal too late.* The court's decision was to the effect that the surety company could not obtain an extension of the statutory time to appeal merely by first mistakenly attempting to obtain relief by motion to vacate. In the case at bar no such question was involved. The present suit was started at a time when petitioner had full right to institute it. The decision below in this case was not that by reason of the time lost in her futile attempt to obtain relief in the Probate Court her present suit could not be maintained, but on the contrary, was that her present suit is barred by *res judicata.* There were questions of *res judicata* in the *American Surety Company case,* but they involved an effort by the surety company to obtain relief through the federal courts after it had been denied relief in the state courts where it had had a hearing and decision by the State Supreme Court of the ultimate question, which was whether it was liable upon the bond involved in the litigation. See opinion page 165. The claim made in respondent's brief as to what was held by this court in the *American Surety Company case* is unfounded and misleading.

CONCLUSION

We respectfully submit that neither in the opinion of the Supreme Court of Ohio nor in the brief of respondent is there any showing made to the contrary of the contentions presented in our former brief, showing a denial to petitioner of all opportunity to have her equitable rights and titles heard and determined upon their

merits and that the only way in which a gross miscarriage of justice can be prevented is by a review by this court of the proceedings in the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1940

No. 270

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF THE WILL OF GEORGE A. BOLLES, DECEASED,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

For the proper consideration of petitioner's petition for writ of *certiorari* it is necessary to set forth facts in addition to those stated by opposing counsel on pp. 2 to 5 of their brief. Some corrections in the statement of opposing counsel are also necessary.

The Constitution of Ohio, adopted in 1851, as amended, provides, Art. IV, Section 1 (Page's Ohio General Code Annotated, 1939, Vol. 11):

> "The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, *Courts of Probate,** * * *."

Section 8 provides:

> "The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, * * * *and such other jurisdiction, in any county or counties, as may be provided by law.*"

The above excerpts show that the Constitution confers upon the Probate Courts just as great capacity to receive such jurisdiction as the legislature may be pleased to grant, as it confers upon the Courts of Common Pleas.

Prior to the adoption of the present Probate Code, which became effective on January 1, 1932 (Page's Ohio General Code Annotated, Vol. 7, Sections 10500 to 10512), there was no statute specifically conferring on Probate Courts equity powers. See Table of Parallel Sections, Page's Ohio General Code Annotated, Vol. 7, p. 105.

The New Probate Code, effective January 1, 1932, in §10501-53, provided as follows:

> "Sec. 10501-53. *Jurisdiction of the probate court.* Except as hereinafter provided, the probate court shall have jurisdiction:
>
> * * * * *
>
> 3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates;
>
> * * * * *
>
> 13. To direct and control the conduct of fiduciaries and settle their accounts."

*Italics appearing in this and other quotations are supplied for emphasis.

The section then provides that

> "Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law."

And finally, that there may be no possible ground for questioning the jurisdiction, the section adds the paragraph:

> "The probate court shall have plenary power *at law and in equity* fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

The New Probate Code, Section 10509-41, further requires every executor or administrator to make and return on oath into court

> "* * * a true inventory of the real estate of the deceased located in Ohio, and of the goods, chattels, moneys, rights and credits of the deceased, *by law to be administered, and which have come to his possession or knowledge,* * * *."

Upon the filing of exceptions Section 10509-59 requires the Probate Court forthwith to set a day not later than one month after the day such inventory is filed, "for hearing the inventory," and provides the notice that must be given to the surviving spouse, next of kin, beneficiaries, etc. It goes on to provide:

> "* * * Exceptions to the inventory and/or year's allowance may be filed at any time prior to five days before the date set for hearing * * * *by any person interested in the estate or in any of the property included in the inventory.* * * * When exceptions are filed notice thereof and time of hearing thereon shall forthwith be given to the executor or administrator. * * * At the hearing the executor or administrator and any witness may be examined under oath. The court must enter its finding on the journal and tax the costs as may be equitable."

The case of *Bolles vs. Toledo Trust Co.* (1936), 132 O. S. 21, 4 N. E. (2d) 917, referred to by opposing counsel on p. 3 of their brief, originated upon exceptions to the inventory of the estate of George A. Bolles, deceased, filed by Mrs. Bolles under favor of the statute, on April 6, 1934. The exceptions were in the words and figures following, R. p. 412:

> "Said inventory and appraisement includes the following items of personal property *which should not be included as a part of said estate, for the reason that decedent had set aside the same for the benefit of said Clara C. Bolles,* his widow, by depositing the same in a safety deposit box to which she had access during his lifetime, and after the death of said George A. Bolles, said safety deposit box and contents were under the exclusive control of said Clara C. Bolles, to be used by her as her separate property, *and said contents were not intended to be included in the inventory and appraisement of said estate, to-wit*: (A list of the securities follows.)

She prayed, R. p. 414:

> "Wherefore said Clara C. Bolles prays that on hearing of said inventory and appraisement by said executor, *the above described stocks, bonds and notes be eliminated from said inventory and appraisement and be declared the property of said Clara C. Bolles and that said executor be ordered to return the same to said Clara C. Bolles.*"

The exceptions were overruled by the Probate Court, and Mrs. Bolles appealed to the Court of Common Pleas. Here she amended her exceptions, claiming, R. p. 361:

> "Said exceptor further says that each and all of the above described items of personal property are owned exclusively by her, that said personal property was given to her by said decedent, that

said property was accepted by said exceptor and retained by said exceptor in a safe deposit box rented in the name of Blevins Realty Company in The Ohio Savings Bank & Trust Company until December 21, 1931, and at all times subsequent thereto in a safe deposit box of Blevins Realty Company in The Toledo Trust Company, to which safe deposit boxes said exceptor was authorized to and did have access, and in which safe deposit boxes said items of personal property were segregated, set aside and retained, and considered by her and by said decedent as property belonging exclusively to said exceptor."

She prayed, R. p. 364:

"Wherefore, said exceptor, Clara C. Bolles, prays that the court order and direct The Toledo Trust Company, executor of the will of George A. Bolles, deceased, to exclude from the inventory of the assets of the estate of said decedent the property hereinbefore described, to return to her each and all the items of personal property hereinbefore described, and to do such things as are necessary to enable her to secure the transfer thereof upon the books and records of the respective corporations issuing said certificates and evidences of indebtedness, and for such other and further relief as the court deems just and equitable in the premises."

Mrs. Bolles' exceptions were sustained in the Court of Common Pleas and in the Court of Appeals.

The case finally reached the Supreme Court of Ohio, and that court reversed the judgment of the Court of Appeals and entered final judgment in favor of The Toledo Trust Company, as executor. See *Bolles vs. Toledo Trust Co., Executor* (1936), 132 O. S. 21, 4 N. E. (2d) 917.

The Supreme Court in its mandate, R. p. 473, said:

> "This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and final judgment is hereby rendered in favor of the appellants."

The judgment of the Supreme Court of Ohio to which the present petition for writ of *certiorari* is directed, *Bolles vs. The Toledo Trust Co., Executor,* opinion of the Supreme Court of Ohio printed at 136 O. S. 517, was rendered in a suit instituted by Mrs. Bolles in the Court of Common Pleas of Lucas County, Ohio, on May 8, 1937, after the decision reported in 132 O. S. 21. In her petition in this suit Mrs. Bolles set forth two causes of action, both relating to the identical securities described in her former exceptions. In the first cause of action she set up an alleged oral declaration of trust by Mr. Bolles under which declaration Mr. Bolles was to hold the legal title to the securities until his death, at which time, she claims (R. p. 6):

> "* * * said trust, by the terms of his said declaration, was to and did terminate, and if plaintiff survived him, as she did, said property *was to and did become the sole property of this plaintiff* and was to be transferred to her as the beneficiary of said trust, * * *." (See R. p. 6.)

She further alleges (R. p. 7) that

> "* * * testator *intended that upon his death she should have the sole and exclusive legal and equitable title and ownership* to each and all of the items of personal property hereinbefore described, * * *"

and that she (R. p. 8)

> "* * * considered and believed that said property *would belong exclusively to her upon his (i.e., Mr. Bolles') death;* * * *."

In the second cause of action plaintiff repeated, by incorporation, the allegations of her first cause of action (see R. p. 8), and set forth matters as grounds for the declaration of a constructive trust.

The ultimate demand of the plaintiff in her petition (R. p. 13) was that the executor be ordered to

> "* * * transfer, turn over and deliver to the plaintiff each and all of the items of personal property and to do such other things as are necessary to enable the plaintiff to receive the benefits of said trust. * * *"

This demand, it will be noted, is identically the same as the demand which Mrs. Bolles made in her exceptions —compare demand in the present suit, R. pp. 13 and 14, with the demand in the original exceptions filed in the former suit, R. p. 414, and the demand in the amended exceptions in that suit, R. p. 364.

In the answer, besides other matters, The Toledo Trust Company, executor, set forth the proceedings and judgment and order of the Supreme Court in the former case (R. p. 29) and claimed that by reason thereof plaintiff was estopped from asserting the claim set forth in her first cause of action herein; that said judgment of the

Probate Court of Lucas County, Ohio, and the judgment, findings and opinion of the Supreme Court of Ohio were a bar to the first cause of action, and that all the matters set forth in said first cause of action had been fully adjudicated and determined in the proceedings hereinbefore described and set forth.

The same matter was interposed to the second cause of action (R. p. 35).

In her reply Mrs. Bolles pleaded again that the property, namely, the securities,

> "* * * became the property of and was owned by this plaintiff upon and after the death of said George A. Bolles * * *." (R. p. 36.)

She reiterated her claim:

> "* * * that said George A. Bolles intended and stated that the plaintiff should and would become the absolute owner (*i.e.*, of the securities) upon his death * * *." (R. p. 45.)

She admitted the allegations of the answer setting forth the pleadings and judgment in the former case, and pleaded further (R. p. 41):

> "Plaintiff alleges the decree of the Supreme Court is an adjudication in her favor, or at least an estoppel by verdict or judgment against the defendant, to the effect that it was the intention of George A. Bolles that the plaintiff should benefit by and have said property at his death, * * *."

The present case was tried almost entirely upon the evidence in the former case as read from the printed transcript of the evidence in that case. In fact, the Court of Appeals, in its opinion in the present case, said:

> "The record in the instant case consists of the printed copy of the transcript of the evidence used in the Supreme Court in the former case, together with additional evidence offered on behalf of the plaintiff in Common Pleas Court in the present case. This additional evidence is by some half dozen witnesses who had testified in the former case, and their testimony here is largely an amplification of their former testimony with reference to statements made by George A. Bolles that he was 'salting' or 'planting' or 'placing' the securities in the safety box at the bank for his wife."

It will be seen from the foregoing that the former proceeding and the present suit are identical in the following particulars:

(1) The parties are the same;

(2) The securities claimed are the same;

(3) The claim of property in the securities is the same, namely, the present complete legal and equitable title to all the securities;

(4) The relief demanded is the same, namely, the endorsement and surrender of possession of the securities and of all proceeds and dividends therefrom;

(5) The record is the same, except as to the amplification of their testimony by certain witnesses.

On the trial counsel for defendant, The Toledo Trust Company, executor, offered in evidence, from the bill of exceptions taken in the first case, the exceptions and amended exceptions to the inventory filed in the first case and the opinion of the Supreme Court and its judgment in that case (R. pp. 294 to 296), stating distinctly that these were offered on the plea of *res judicata* and estoppel contained in the answer (R. p. 295).

To this offer the only objection interposed by opposing counsel was this (R. p. 295):

> "By Mr. Welles:
> "We object to the offering of the portions of the bill of exceptions. *We have no objections to it all being offered.*"

Counsel for defendant executor proceeded (R. p. 296):

> "And then I (*i.e.*, counsel for The Toledo Trust Company, executor) offer the opinion of the Supreme Court as published in Volume 132 in this same case, and I also offer the order of the Supreme Court as appears on page 7 of our answer.
> By Mr. Welles:
> That is admitted by the pleadings.
> By Mr. Ohlinger:
> It is admitted by the pleadings, but I am offering the admission.
> By Mr. Watkins (counsel for Mrs. Bolles):
> Are you marking the Supreme Court opinion as an exhibit?
> By Mr. Ohlinger:
> I suppose it should be marked as an exhibit. It is marked as Exhibit O, and we will supply a typewritten copy of that, and the order of the Supreme Court will be marked Exhibit P—a typewritten copy of the order as appears in the answer."

Exhibit O, the opinion of the Supreme Court in the former case, reported at 132 O. S. 21, 4 N. E. (2d) 917, is not in the printed record, the printing of the opinion having been omitted by stipulation, R. p. 350. The order appears in the answer, R. p. 29.

No motion was made to strike out the allegations of defendant's answer to the effect that the judgment in the former case was *res judicata;* no objection was made to

the introduction of the judgment and opinion of the Supreme Court in evidence.

Nowhere throughout the entire record is there a motion, objection or exception calling attention to any federal right—in fact, the term "federal right" appears nowhere in the record.

Not until after the Supreme Court had decided the present case did opposing counsel suggest the existence of any federal question, and then it was only upon their application for rehearing.

ARGUMENT

(1) Petitioner Made No Attempt to Raise Any Federal Question in the Court of Common Pleas, Which Was the Trial Court, or in the Court of Appeals, or in the Supreme Court of Ohio.

Jurisdiction is the primary concern of this court upon every appeal. When a party seeks a review on the ground that a federal right has been denied, this court looks first of all to the record to determine whether the alleged federal right was properly claimed in the state court. No federal right was claimed in this case.

As we have shown, the answer of respondent, The Toledo Trust Company, executor, put the petitioner on notice at the very outset that it insisted upon the judgment in the first proceeding as *res judicata* and as an estoppel against the assertion of her claims in the present suit. Evidence was offered by respondent in support of the defense and was received without objection.

If, as opposing counsel now contend, the effect of

holding that the judgment in the previous action was *res judicata* as to the present suit is to deny to petitioner any opportunity for a hearing upon the merits of her cause of action in violation of her rights under the Fourteenth Amendment, then the defense was no defense at all, and its inclusion in the answer and the receiving of evidence in support of it were both improper.

The challenge to petitioner's alleged federal right came *in limine*, and it was for her to meet it then and there, and not to wait until after the Supreme Court of Ohio had sustained the defense before claiming it for the first time upon her application for rehearing.

It was open to respondent, under the Ohio Code of Civil Procedure, to attack the defense of *res judicata* as denying petitioner any opportunity for a hearing on the merits of her cause of action in violation of her rights under the Fourteenth Amendment, in the following ways:

(a) Under General Code, §11316, by a motion to require defendant to separately state and number the defense of *res judicata*:

> Eureka Fire & Marine Insurance Co. vs. Baldwin (1900), 62 O. S. 368, at p. 384, 57 N. E. 57;
>
> Denison University vs. Manning (1901), 65 O. S. 138, at p. 152, 61 N. E. 706.

Then under General Code, §11323, respondent could have demurred to the defense, raising by such demurrer the very point that petitioner now seeks to raise under the Fourteenth Amendment.

(b) The same claim of federal right could also have been raised under General Code §11370 by motion to

strike out the allegations in regard to the former proceeding, such a motion having the effect of raising the question of the sufficiency of the defense.

Miller et al. vs. Hixson (1901), 64 O. S. 39, at p. 56, 59 N. E. 749.

(c) The same claim of federal right could also have been made by objection to the evidence offered in support of the plea of *res judicata*, R. pp. 294 to 296.

The Supreme Court of Ohio will not hear and determine questions not presented and determined by the trial court. In *Stephenson vs. State of Ohio* (1928), 119 O. S. 349, 164 N. E. 359, the court said, p. 355:

> "It is particularly stated by counsel for plaintiff in error that they desire a review of the principles decided by this court in the case of *Tari vs. State*, 117 Ohio St. 481, 159 N. E. 594, and, more particularly, because this court in that case did not hold that the statutes under which the mayor's court exercised jurisdiction are unconstitutional. This court did so hold in the *Tari* case, and at the same time declared that the Supreme Court of the United States in the *Tumey* case had not held those statutes to be unconstitutional. It is not necessary in the instant case to make any declarations upon that point, because such questions were not argued in the lower courts, except in the oral argument before the Court of Appeals, for the first time, and such questions were not even suggested in the Court of Common Pleas or in the mayor's court. *We are not bound to declare either way upon questions which have not been decided by the courts of first instance.* We are not without abundant authority upon this proposition. *First Nat. Bank of Cape Girardeau vs. Foster* (Mo. App.), 271 S. W. 536; *Peverill vs. Board of Supervisors of Black Hawk Co.*, 201

Iowa 1050, 205 N. W. 543; *Ogilvie vs. Hailey,* 141 Tenn. 392, 210 S. W. 645; *Haun vs. State, ex rel. Bd. of Commrs. of Carroll Co.,* 183 Ind. 153, 108 N. E. 519; *Crowley vs. State,* 11 Or. 512, 6 P. 70; *Thrift vs. Laird,* 125 Md. 55, 93 A. 449; *Northumberland County vs. Zimmerman,* 75 Pa. 26, 32.

"All of the foregoing cases were decided by state courts. The Supreme Court of the United States has, however, declared the same principle in unmistakable language. In *Brooks vs. Missouri, supra,* Chief Justice Waite wrote the opinion. From the syllabus we quote:

> "'Applying to this case the rules stated in *Spies vs. Illinois,* 123 U. S. 131 (8 S. Ct. 22, 31 L. Ed. 80), that "to give this court jurisdiction under Section 709 Rev. Stat. (Title 28, Section 344, U. S. Code) because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, *it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way;*" that "to be reviewable here the decision must be against the right so set up or claimed;" and that "*as the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court,*" it appears that at the trial of the plaintiff in error, no title, right, privilege or immunity under the Constitution, laws or treaties of the United States were specially set up or claimed in the trial court.'
>
> "*Inasmuch as the invalidity of statutes was not brought in question in either the mayor's court or Court of Common Pleas, this court is not called upon under the authorities above quoted to again review the arguments set forth in the case of Tari vs. State, supra, asserting their constitutionality.*"

In the present case no federal question was ever decided by the Supreme Court of Ohio. The alleged federal claim was first advanced in the application for rehearing, but such an application, it is well settled, is addressed solely to the discretion of the court.

> "Rehearing in the court of review is not a matter of right but is a privilege which the court may grant in a proper case or may, in its discretion, *deny in any case* * * *. The reason that rehearings are not awarded as a matter of right in such courts is not any assumption of their infallibility, but the very practical one that there must at some time be an end of litigation not only for the benefit of the parties in each particular case but to enable others standing behind them to have their rights determined." 2 Ohio Jurisprudence 606, §565.

As stated in *Stephenson vs. State of Ohio, supra,* the Supreme Court of Ohio was "not bound to declare either way upon questions which have not been decided by the courts of first instance." No such question having been decided by the Court of Common Pleas in the present case, the Supreme Court was not obliged to pass upon it, even if it had been raised by opposing counsel in their argument upon the merits in the Supreme Court; still less was the Supreme Court called upon to decide it when it had not been raised in the Court of Common Pleas, or even in the Court of Appeals or before the Supreme Court, and when the first mention of the alleged federal claim came in the application for rehearing.

It is clear, therefore, that in the present case no federal right has been passed upon by the Supreme Court of Ohio.

This court is without jurisdiction to review the decision of a state court when no federal question has, as a matter of fact, been considered and determined.

Spies vs. Illinois (1887), 123 U. S. 131, at p. 181, 8 S. Ct. 22, 31 L. Ed. 80;

New York vs. Graves (1937), 300 U. S. 308, at p. 317, 57 S. Ct. 466, 81 L. Ed. 666.

(2) Petitioner's Attempt to Claim for the First Time in Her Application for Rehearing Her Alleged Right Under the Fourteenth Amendment Was Not Timely.

The next most important concern of this court upon a petition for writ of *certiorari* is the timeliness of the assertion of the alleged federal right.

Opposing counsel rely principally upon the decision in *Brinkerhoff-Faris Trust & Savings Co. vs. Hill* (1930), 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107. In this case the company brought suit to enjoin a county treasurer from collecting or attempting to collect alleged discriminatory taxes assessed against shares of its capital stock, alleging that it had no adequate remedy at law or before the County Board of Equalization or before the State Board of Equalization. The trial court refused the injunction, and the Supreme Court of Missouri affirmed the trial court on the ground that plaintiff had an adequate remedy before another body, the State Tax Commission. In so deciding the State Supreme Court reversed its previous positive holdings in *Laclede Land & Improvement Co. vs. State Tax Commission*, 295 Mo. 298, and in other cases, which had become the established law, that there was *no* remedy before that commission.

This court stated the situation in these words, p. 677:

> "No one doubted the authority of the *Laclede* case until it was expressly overruled in the case at bar * * *. *The possibility of relief before the Tax Commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929.* Then it was too late for the plaintiff to avail itself of the newly found remedy."

The foregoing quotation from the opinion of this court sufficiently emphasizes the distinction between the *Brinkerhoff-Faris Trust & Savings Co.* case and the present case: there the possibility of relief before the State Tax Commission *"was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929;"* in the present case the defense of *res judicata* was made by defendant in its first pleading in the trial court, evidence was offered in support of it on the trial and was received without objection, and this record was the basis of the decision of the Supreme Court of Ohio.

This court will not consider claims first made in an application for rehearing:

Godchaux Co. vs. Estopinal (1919), 251 U. S. 179, 40 S. Ct. 116, 64 L. Ed. 213;

Citizens National Bank vs. Durr (1921), 257 U. S. 99, 106, 42 S. Ct. 15, 66 L. Ed. 149;

Herndon vs. Georgia (1935), 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530;

Pennsylvania R. C. vs. Illinois Brick Co. (1936), 297 U. S. 447, 56 S. Ct. 556, 80 L. Ed. 796.

The present case is not one where the alleged federal claim arose from an unanticipated disposition of the case at the close of the proceedings in the State Supreme Court, but, on the contrary, it is one where

> "There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

See

American Surety Co. vs. Baldwin (1932), 287 U. S. 156, 163, 53 S. Ct. 98, 77 L. Ed. 231.

The present case presents very strikingly what this court in

Bridge Proprietors vs. Hoboken Co. (1864), 1 Wall. 116, 143, 17 L. Ed. 571,

and again in

Chicago, Indianapolis & Louisville R. Co. vs. McGuire (1905), 196 U. S. 128, 25 S. Ct. 200, 49 L. Ed. 413,

described as an

> "attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

(3) Matters of State Procedure Do Not Raise a Federal Question.

Opposing counsel have cited many Ohio cases dealing with the jurisdiction of the Probate Court which were rendered *before* the New Probate Code took effect on January 1, 1932.

With the exception of the case of *Juhascz vs. Juhascz* (1938), 134 O. S. 257, 16 N. E. (2d) 328, opposing

counsel have cited *no* Supreme Court case and *no* lower court case on the jurisdiction of the Probate Court upon exceptions to an inventory under the new code. In the *Juhascz* case, the widow (1) filed an election as surviving widow in which she stated that she repudiated an antenuptial contract; and (2) excepted to the refusal of the appraisers to set off to her her year's allowance and statutory setoff, but said nothing about the antenuptial contract. The Supreme Court of Ohio merely held that the filing of the election and the filing of the exceptions did not constitute "an action to set aside" the antenuptial agreement, nor an attack upon it, within the contemplation of G. C. §10512-3. Syllabus 5, which states the law, reads:

> "5. Under Section 10512-3, General Code, an antenuptial agreement is deemed valid unless an action to set it aside is brought within six months after the appointment of the executor or administrator, or unless the validity of the agreement is otherwise attacked within that period, and neither the filing of a written election to take under the law, in which is incorporated a statement that the widow repudiates 'the prenuptial agreement, which was procured by fraud,' nor the filing of exceptions to the inventory and appraisement on the ground that the appraisers failed to allow the statutory setoff and a year's support to the widow, constitutes an attack within the purview of the statute."

This is all that the court decided, or that it was necessary to decide, in the case. Whatever other implications opposing counsel desire to draw from points which were not decided, or which were not necessary for a decision of the *Juhascz* case, the fact remains that the well-considered opinion of the Supreme Court in the

former case of *Bolles vs. Toledo Trust Co.* showed plainly that the court regarded the Probate Court as having jurisdiction, upon exceptions to the inventory, to determine the relevant questions of title to the securities. Nor may Mrs. Bolles, after having invoked the jurisdiction of the Probate Court, now question its exercise of that jurisdiction.

See the very emphatic statements of the Supreme Court of Ohio on this point, and against thus trifling with the courts in

State ex rel. vs. Roach (1930), 122 O. S. 117, 170 N. E. 866;

Hedland vs. Jones (1934), 128 O. S. 68, 190 N. E. 214.

See also

Chicot County Drainage District vs Baxter State Bank, decided by United States Supreme Court, January 2, 1940, 84 L. Ed. 277.

As we have already pointed out, the new code differs from all previous statutes in providing expressly in §10501-53 that

> "The probate court shall have plenary power *at law and in equity* fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited by statute."

This very provision was considered by the Supreme Court of Ohio in *Unger vs. Wolfe* (1938), 134 O. S. 69, 15 N. E. (2d) 955. Here a firm of attorneys brought action in the Court of Common Pleas to recover for services rendered a person who had been adjudged an incom-

petent and whose estate had been placed in the hands of a guardian appointed by the Probate Court. The attorneys insisted that in view of G. C. §11215 conferring on the Court of Common Pleas general original jurisdiction —the very section on which opposing counsel build their argument on p. 11, *et seq.*, of their brief—the action had been properly instituted in that court. The Supreme Court of Ohio referred to the provision which we have quoted and said, page 74:

> "The difficulty with this contention of the plaintiff is that Section 11215 is an old and general statute while Section 10501-53 is recent and special. Therefore under the canons of statutory construction the latter must take precedence over the former. *It is difficult to escape the effect of specific provisions that 'such jurisdiction shall be exclusive in the Probate Court unless otherwise provided by law' and that 'the Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute'.*" (Italics supplied.)

No proposition is more thoroughly established than that federal courts follow state decisions in the interpretation of state statutes:

> Keith vs. Johnson (1926), 271 U. S. 1, 46 S. Ct. 415, 70 L. Ed. 795;
>
> Sioux County vs. National Surety Co. (1928), 276 U. S. 238, 48 S. Ct. 239, 72 L. Ed. 547;
>
> Chicago, M., St. P. & P. R. Co. vs. Risty (1928), 276 U. S. 567, 48 S. Ct. 396, 72 L. Ed. 703;
>
> Erie R. Co. vs. Tompkins (1938), 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

In asking this court to review the present case opposing counsel are in reality asking this court to interpret an Ohio statute and to define the jurisdiction of a probate court upon exceptions to an inventory.

This is not within the jurisdiction of this court.

American Surety Co. vs. Baldwin (1932), 287 U. S. 156, 163, 53 S. Ct. 98, 77 L. Ed. 231.

(4) A Decision That a Matter Has Been Adjudicated in Another Proceeding Does Not Raise a Federal Question.

The Supreme Court of Ohio, in deciding that the former proceeding was *res judicata* as to the present action, cited a leading case decided by this court:

Northern Pacific R. Co. vs. Slaght (1907), 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 738.

In that case it appeared that the predecessors in interest of the Northern Pacific R. Co. had brought suit against Slaght for the purpose of having him "declared a trustee, and as holding the land in trust" for said parties by virtue of a deed to them of said lands from one Powers—see opinion, p. 128. Judgment in this action went in favor of Slaght, and against the predecessors of the Northern Pacific Railway Co. Thereafter the Northern Pacific brought the principal action, an action in ejectment against Slaght—see opinion, p. 125—claiming title in its predecessors, and therefore in itself, by virtue of an Act of Congress and by reason of the statute of

limitations of the state. This court, on page 131, quoted with approval from Herman on Estoppel, §92, as follows:

> " 'Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, *when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property,* for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.' " (Italics supplied.)

In the former proceeding Mrs. Bolles claimed the entire legal and beneficial ownership of the securities on the ground of an alleged trust and gift *inter vivos;* in the present case she claimed the same thing on the ground of an alleged oral declaration of an express trust or on the ground of a constructive trust by reason of the alleged intent of Mr. Bolles to give her the securities and his alleged belief that he had carried out that intention. The *claim,* in the language of this court in the *Slaght* case was the same in both cases—the entire present legal and equitable title to the securities.

If the securities were subject to the alleged trusts, then they were not properly a part of the testator's estate —Mr. Bolles held them as trustee. He was in the same position as the testator, one Nehemiah Scott, in the case of *Quinby vs. Walker* (1863), 14 O. S. 193. Here the beneficiaries of the securities which Nehemiah Scott had held as trustee during his lifetime brought suit against

his executor, James G. Scott, upon the latter's administration bond to recover the proceeds which James G. Scott had collected on these securities, The situation presented two questions which the Supreme Court states in its opinion (p. 198): (1) "Did, then the bonds which are claimed to have been collected by James G. Scott, as executor, belong, in any substantial sense to his testator, at the time of his death?" (2) "Were they goods, chattels, or credits of the testator, which it became the duty of his executor to administer?" The Supreme Court answered these two questions, pp. 198, 199:

> "* * * We think they are shown not to have been assets of the estate. The testator was, in respect to them, a mere trustee, who had faithfully fulfilled his trust up to the time of his death. The whole beneficial interest in them was in the heirs of William Moore, and their assignees; and neither creditors, heirs nor legatees of the testator could assert a claim to them or their proceeds.
>
> * * * * *
>
> "* * * Having collected the bonds, James G. Scott is, no doubt, liable to account to the plaintiff for his share of the proceeds; but we think it equally clear, that as the trust funds so collected were not assets of the estate of his testator, his default as trustee, is not chargeable to his sureties in the administration bond."

Nor was the case of *Quinby vs. Walker* overruled by the decision in *Dayton vs. Bartlett*, 38 O. S. 357 (1882), as claimed by opposing counsel, brief p. 31. The latter case dealt with an entirely different subject—tenancy in common in partnership assets—and did not even refer to *Quinby vs. Walker*. As late as 1930, the Supreme Court cited and recognized the authority of *Quinby vs. Walker*.

See

The United States Fidelity & Guaranty Co. vs. Decker, Adm'r. (1930), 122 O. S. 285, 287, 171 N. E. 333.

The exceptions distinctly raised the question: Were the securities claimed by Mrs. Bolles, in the words of General Code of Ohio, §10509-41, "goods * * * of the deceased by law to be administered?"

They were not such "goods * * * of the deceased by law to be administered": (1) if Mr. Bolles had given them to Mrs. Bolles during his lifetime; or (2) if, as in *Quinby vs. Walker*, they were held by Mr. Bolles subject to the alleged trusts.

The judgment in the previous case decided that they *were* "goods * * * of the deceased by law to be administered," and that concluded all other claims to the property.

The Supreme Court of Ohio therefore correctly applied the principles of *res judicata* as laid down by this court in the *Slaght* case.

But even granting that the Supreme Court of Ohio did not correctly apply the principles, still such an error does not raise a federal question and this court has no jurisdiction to review the decision of the Supreme Court of Ohio. An *erroneous* decision does not deprive a party of his property without due process of law within the terms of the Fourteenth Amendment:

Central Land Co. vs. Laidley (1895), 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91.

And the same is true of an erroneous decision that a previous judgment is *res judicata*:

> Chicago Life Ins. Co. vs. Cherry (1917), 244 U. S. 25, 28 to 30, 37 S. Ct. 492, 61 L. Ed. 966;
>
> Baldwin vs. Iowa State Traveling Men's Ass'n. (1931), 283 U. S. 522, 524, 51 S. Ct. 517, 75 L. Ed. 1244.

It is to be noted that in this case petitioner, in her reply, expressly invoked the judgment of the Supreme Court of Ohio in the previous proceeding as an *adjudication in her favor*. She said in her reply, R. p. 41:

> "Plaintiff alleges the decree of the Supreme Court is an adjudication in her favor, or at least an estoppel by verdict or judgment against the defendant, to the effect that it was the intention of George A. Bolles that the plaintiff should benefit by and have said property at his death, * * *."

The Supreme Court of Ohio having been called upon by both parties to interpret and apply its decree, did interpret and apply it in the case before it.

Its interpretation and application of its decree did not raise a federal question.

(5) Opposing Counsel's Misapprehension as to the Appropriate Procedure Under the New Probate Code, If There Was Such Misapprehension, Does Not Furnish a Basis for the Claim That Due Process of Law Has Been Denied.

We do not wish to be understood as suggesting that opposing counsel misapprehended the appropriate procedure under the New Probate Code. On the contrary, in the exceptions filed in the first proceeding Mrs. Bolles

distinctly pleaded everything that she now claims. She said, R. p. 412:

> "Said inventory and appraisement includes the following items of personal property *which should not be included as a part of said estate, for the reason that decedent had set aside the same for the benefit of said Clara C. Bolles, his widow,* by depositing the same in a safety deposit box to which she had access during his lifetime and after the death of said George A. Bolles said safety deposit box and contents were under the exclusive control of said Clara C. Bolles, to be used by her as her separate property, *and said contents were not intended to be included in the inventory and appraisement of said estate, to-wit:*"

She prayed, R. p. 414:

> "Wherefore said Clara C. Bolles prays that on hearing of said inventory and appraisement returned by said executor, the above described stocks, bonds and notes be eliminated from said inventory and appraisement and be declared the property of said Clara C. Bolles and that said executor be ordered to return the same to said Clara C. Bolles."

These exceptions raised the issue of the right of property in the securities, whether on the ground of a gift *inter vivos*, or on the ground of a trust by virtue of which the entire legal and equitable title devolved on Mrs. Bolles upon her husband's death.

Opposing counsel's argument on pp. 11 to 22 to the effect that the previous proceeding was a special proceeding, and the present suit is one in equity, is pointless because petitioner *did choose* the special proceeding, and having submitted her claims to adjudication in that proceeding, she cannot now seek to avail herself of a suit

in equity. As said by this court in *Stoll vs. Gottlieb* (1938), 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104:

> "* * * It is just as important that there should be a place to end as that there should be a place to begin litigation * * *."

But even if counsel misapprehended the appropriate procedure, as they infer on pp. 44 to 46 of their brief, such misapprehension furnishes no ground for the jurisdiction of this court. The same argument was made in *American Surety Co. vs. Baldwin* (1932), 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231. This court said in answer to this argument, p. 168:

> "The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course, the time for appealing had elapsed. *The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error, does not furnish the basis for a claim that due process of law has been denied.* Compare *O'Neil vs. Northern Colorado Irrigation Co.*, 242 U. S. 20, 26."

CONCLUSION

For the reasons stated the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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BECKWITH, OHLINGER, KOLES & WOLF,
Of Counsel.